Supreme Court, U.S.
FILED

①

No. 06-753 NOV 27 2006

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

◆

KAREN CETEL; MORTON SCHNEIDER; MARVIN CETEL;
MARVIN CETEL, M.D., P.A.; BARBARA SCHNEIDER,
BARBARA SCHNEIDER M.D., F.A.C.S., P.A.,
Petitioner,

—v.—

KIRWAN FINANCIAL GROUP, INC.; BARRY COHEN, *et al.*,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

PETER W. TILL
LAW OFFICES OF PETER W. TILL
Attorneys at Law
(*Counsel of Record*)
105 Morris Avenue, Suite 201
Springfield, New Jersey 07081
(973) 258-0064

Attorneys for Petitioner

QUESTIONS PRESENTED

Whether or not a RICO cause of action accrues upon an "injury discovery" rule under which a Plaintiff knows or should have known of injury, or an "injury occurrence" rule under which knowledge of injury is irrelevant?

Whether or not the statute of limitations for a RICO cause of action is equitably tolled on the date that sufficient "storm warnings" first appear or the later date on which an investor alerted by "storm warnings" and exercising reasonable diligence would have discovered the injury?

Wheth~~er or~~ not actual damages are required before RICO cause of action accrues?

PARTIES TO THE PROCEEDING

Petitioner here is Barbara Schneider, a Plaintiff in the district court and an appellant below.

Respondents, who were Defendants in the district court and appellees below, are:

Commercial Life Insurance Company, *et al.*
Pacific Executive Services, *et al.*
Medical Society of New Jersey
Raymond G. Ankner
Barry Cohen
Michael Kirwan
Kirwan Financial Group, Inc.
Barry Cohen
Michael Kirwan
Neil Counsel
Lampf, Lipkind, Counsel, Petigrow & LaBue
Raymond G. Ankner
CJA Associates
Beaven Companies, Inc.
Medical Society of New Jersey
Inter-American Insurance Company of Illinois
Commonwealth Life Insurance Company,
Peoples Security Life Insurance Company,
Monumental Life Insurance Company,
Capital Holding Company,
Aegon Insurance Group,
Indianapolis Life Insurance Company

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION .. 12

Point I—The Accrual of Civil RICO Action Should Be Equitably Tolled where reasonable diligence would not have revealed an actual injury 12

Point II—Fraudulent Concealment Ought Properly Equitably Toll RICO Statute of Limitations to Allow Reasonable Inquiry Post-Storm Warnings 19

Point III—The Zenith Radio Exception Ought Properly Be Found to Apply to the RICO Claims in that Accrual Cannot Occur Prior to Default by Defendants 23

PAGE

A. The Actual Value of the Loss was Not Calculable 26

B. RICO Injury Is Not Ripe Until A Default Occurs in a Contractual Obligation 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases: PAGE

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987) 13

Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988) 26

Caviness v. DeRand Res. Corp., 983 F.2d 1295 (4th Cir. 1993) 16-17

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)... 21

Clark v. Iowa City, 87 U.S. (20 Wall.) 583, 22 L.Ed. 427 (1874)......................... 15

Cook v. Avien, Inc., 573 F.2d 685 (1st Cir. 1978) 17

Cruden v. Bank of New York, 957 F.2d 961 (2d Cir. 1992) 26

Davis v. Grusemeyer, 996 F.2d 617 (3d Cir. 1993) 19

Dodds v. Cigna Sec., Inc., 12 F.3d 346 (2d Cir. 1993) 16

First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763 (2d Cir. 1994) 26

Forbes v. Eagleson, 228 F.3d 471 (3d Cir. 2000)............................15, 22, 23

Fujisawa Pharm. Co., Ltd. v. Kapoor, 115 F.3d 1332 (7th Cir. 1997)............... 24

Gray v. First Winthrop Corp., 82 F.3d 877 (9th Cir. 1996)............................... 16

PAGE

Great Rivers Coop. of Southeastern Iowa v. Farmland Indus., Inc., 120 F.3d 893 (8th Cir. 1997) 16

Holmberg v. Armbrecht, 327 U.S. 392 (1946) .. 19

In Maio v. Aetna, Inc., 221 F.3d 472 (3d Cir. 2000) 25

Kennedy v. Josephthal & Co., 814 F.2d 798 (1st Cir. 1987) 17, 18, 21

Keystone Ins. Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988) 13, 14, 15

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 13, 14, 15, 19

Law v. Medco Research, Inc., 113 F.3d 781 (7th Cir. 1997) 24

Lewis v. Herrmann, 755 F. Supp. 1137 (N.D. Ill. 1991) 21

Maggio v. Gerard Freezer & Ice Co., 824 F.2d 123 (1st Cir. 1987) 16, 18, 21

Marks v. CDW Computer Ctrs., Inc., 122 F.3d 363 (7th Cir. 1997) 17

Mathews v. Kidder, Peabody & Co., 260 F.3d 239 (3d Cir. 2001) 16, 21, 23

Merrill Lynch Ltd. P'ships Litig., 154 F.3d 56 (2d Cir. 1998) 26

Merrill Lynch Ltd. P'ships Litig., 7 F.Supp.2d 256 (S.D.N.Y. 1997) 27

PAGE

Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823 (11th Cir. 1999) 22

Neonatology Assocs., v. Comm'r, 115 T.C. 43, 2000 WL 1048512 (2000), *aff'd* 299 F.3d 221 (3d Cir. 2002)........... 9, 11

Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir. 1994) 19

Rawlings v. Ray, 312 U.S. 96 (1941) 15

Rodriguez-Suris v. Montesinos, 123 F.3d 10 (1st Cir. 1997) 22

Rotella v. Wood, 528 U.S. 549 (2000) 14, 15, 19

Sowell v. Butcher & Singer, Inc., 926 F.2d 289 (3d Cir. 1991) 26

United States v. Lindsay, 346 U.S. 568 (1954) .. 15

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) 24, 25

Statutes:

15 U.S.C. § 15(b) 1

28 U.S.C. § 1254(1).............................. 1

I.R.C. § 6662(a) 12

Internal Revenue Code § 419..................... 11

Internal Revenue Code § 419(A)(f)(6) 11

PAGE

Rules:

Federal Rule of Civil Procedure 11(b) 2

Federal Rule of Civil Procedure 9(b)............ 1

Other Authorities

IRS Notice 95-34................................ 10, 12

Securities Fraud Action-Post-Lampf Cases, 148 A.L.R. Fed. 629, 1998 WL 695966 (1998).. 17

Tax Reform Act of 1986, Pub L. 99-514 9

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 460 F.3d 494 (3d Cir. 2006) and reprinted at Pet. App. 1a-38a. The memorandum opinion and order of the district court for the District of New Jersey is *unreported* and reprinted at Pet. App. 39a-100a.

JURISDICTION

The the United States Court of Appeals for the Third Circuit rendered judgment on August 28, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 15(b)[1] provides in part:

> Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

Federal Rule of Civil Procedure 9(b) states:

> (b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

---

[1] This case involves a RICO claim; however, this Court has held that the RICO statute of limitations shall be governed by the statute of limitations period in the Clayton Act, 15 U.S.C. § 15(b).

The Federal Rules of Civil Procedure, Rule 11(b) states, in pertinent part:

> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

STATEMENT OF THE CASE

"Art is long, and Time is fleeting. . ."

Henry Wadsworth Longfellow.

I. The focus and especially the utterly premature disposition of the subject litigation had everything to do with time (the Statute of Limitations) and otherwise ignored the horrendous investment losses which were unknowingly available to the Petitioner and ought properly have been presented to a jury, but otherwise were inexplicably and improperly cast aside.

Nowhere in the record of this matter was the Petitioner ever told where the retirement account funds— were. It is literally incomprehensible that such fact was ignored, yet the Statute of Limitations was allowed to utterly circumvent the case or controversy, which was the legal action to insure the existence of a retirement account. This was the classic trial avoidance strategy, where form has taken over for and in the face of real substance. Once again, there is no explanation or identification where the retirement account dollars were otherwise preserved. Against the backdrop of this torturous fiduciary setting of wrongful financial behavior, the judicial system has been used to cloak otherwise abhorrent and illegal behavior.

The court demonstrated no appreciation of the facts surrounding the "original" purchase scenario and the now well chronicled detrimental reliance to which this Petitioner was subjected.

The reference in the VEBA was far too casual. The marketing of the VEBA was a *retirement plan* including life insurance. It was without dispute that the expected retirement value was the enticement and was further documented in writing. However, the subject of the "conversion" of life insurance premiums was never presented until the Tax Court litigation, in the Fall of 1999. Rhetorically, there having been only an introduction to the question of the tax viability of this retirement plan (notwithstanding the question of whether the retirement plan actually existed) there could have been no conclusion to the outstanding questions sufficient to trigger the discovery of the Petitioner's injury.

The retirement plan premiums were really contributions (as the Petitioner believed) to be to the retirement account fund. The Petitioner had no knowledge that the retirement plan may have otherwise been sustained by inflated life insurance premiums.

The Petitioner's 1990 contribution was lost (but never disclosed to the Petitioner) because the retirement plan bankruptcy was never disclosed. To the contrary, with the regular receipt of retirement plan statements the Petitioner was assured that the money was safe. It was supposedly a pure retirement plan. "Tax avoidance" was never the purpose of getting into the plan.

There was an inexplicable failure in the record to enunciate the purported special knowledge of those doctors, which according to the Court, did not excuse them from due diligence. In fact, Kirwan & Cohen, Financial Advisors, were endorsed by the Medical Society of New Jersey and the same individuals introducing the retirement plan.

Again, this matter has and continues to be fact sensitive and therefore the justification for presentation to a jury clearly existed, especially when combined with the 1995 IRS notification and assurances of counsel that the retirement plan was legitimate in all respects.

The Tax Court case was presented in Fall of 1999. The Petitioner consulted with and retained counsel. Counsel sent out correspondence and in response received documents pertaining to the Petitioner's VEBA. Most or all of the documents contained the Petitioner's forged signatures, in conjunction with the handling of the retirement account.

The Petitioner also retained separate counsel to represent her regarding the Tax Court litigation.

In August 1999 the Petitioner sought further advice from insurance fund retirement specialists. The Petitioner was advised that she was in grave trouble with the particular retirement plan, insofar as its existence and continuing viability. It was then that the Petitioner first suspected and learned that her retirement money was gone. The Petitioner was purportedly eligible to receive $4000/year for 10 years beginning in 2000.

The Tax Court decision was affirmed on appeal in July 2000.

The Petitioner, proceeding with her own due diligence, conferred with Dr. Ophelia Mall (Neonatology) who finally admitted to the Petitioner that during the Tax Court case, when shown the forged documents, she lied and said it was her own signature.

The action before the district court was filed in 2000, the Petitioner believing that the failure to produce the existence of the retirement plan was a "scam". The Insurance Company defendants disingenuously claimed that the action was not "ripe" because the appellate proceedings arising out of the Tax Court had not yet been brought to closure.

In 2002 the district court dismissed the State claims, leaving the Federal claims to be adjudicated.

In 2004 the district court dismissed the remaining Federal claims insisting that the Petitioner, even though concealed, should have been aware of the injuries when the IRS notification was received. It is without dispute however that the now infamous IRS notice was about deductibility, combined with the retirement plan notification announcing that the Petitioner's retirement fund existed and that the monies were safe. The Petitioner received annual statements, annual bills from the Trustee, etc. The Petitioner contributed for herself from 1990–1998 and for her husband from 1994–1998. Yet the forged documents, false written statements and fees were overlooked and the Petitioner was denied any recovery of her money.

Rhetorically, although the Petitioner entered into the "bargain" honestly and in good faith, why then should the Petitioner suffer injury and further be accountable for an insurance company selling an illegal (tax avoidance) plan?

The Petitioner was without any information or reason to suspect a breach of fiduciary duty in 1995. After all, the Petitioner had received a retirement plan endorsed by the Medical Society of New Jersey.

The Petitioner had received several opinions from legal counsel and correspondence from the IRS, which the Petitioner believed in good faith advised that the retirement plan was appropriate in all respects. The Medical Society of New Jersey also published a letter stating that Ernst & Young had reviewed the plan and approved it.

During the deposition discovery of the Chief counsel for the Medical Society of New Jersey, admissions were elicited that the retirement plan purportedly reviewed by accountants was not the same retirement plan of which the Petitioner participated and for which the Medical Society of New Jersey was to receive commissions. It was apparent throughout that the Petitioner's paper trail unquestionably established that she only became aware that the retirement fund monies were gone in the Fall of 1999. This fact was separate and not ever to be confused with the existence of the IRS tax inquiry.

At the time of the district court's tortured decision to embrace the Statute of Limitations as a basis for dismissal, the Petitioner still had no idea as to the whereabouts of the retirement funds. The decision of the district court and the affirmance by the Court of Appeals strains credulity in that the apparent and misplaced rationale is based upon a wholesale disparaging of the Petitioner as a member of the medical profession, who should have known about the purported questionable aspects of the retirement plan. This rationale is the heartland basis of the decision to dismiss, all the while ignoring the most prominent fact that the Petitioner did not and still continues to have no answer to where her money is or went.

Shockingly, summary judgment was granted after 5 years of litigation, where there had been no verifiable presentation of the facts surrounding the concealment and ultimate discovery of the injury coupled together with the unmitigated failure of anyone to explain the whereabouts of the Petitioner's money.

Nevertheless, the decision of the court of appeals stood as nothing more than a rubber stamping of continuing error, in embracing the narrow view that the very preliminary IRS notice constituted the commencement of the limitations period, when in fact the matter had barely reached its infancy. The Petitioner was never notified, however it is clear that the Medical Society of New Jersey ended its endorsement of the retirement plan in 1995, despite continued advertisements in its monthly journal. The IRS notice never condemned the retirement plan but instead sought to disallow the deductions taken. Rhetorically, this Court must decide whether or not the IRS notice addressing the disallowance of deductions constituted a sufficient "storm warning" so that this Petitioner's circumstances would properly cause commencement of the limitations period.

The Petitioner documented her retirement plan contributions for her employee made and corporate checks and continued contributions through 1998 because she thought she was saving for retirement. The fact that the insurance company was participating in the United States Tax Court case further assured the Petitioner that the retirement plan was fully legitimate.

The recurring theme with respect to the decisions in this matter, although clearly a civil proceeding, seem to be infected by a theory of associational guilt, which in no way could apply to this Petitioner had the Court allowed this matter to go to a jury trial, where a full and complete presentation of the facts would have been presented, at the very least defeating the Statute of Limitations defense.

The Petitioner's standing as a physician does not equal knowledge.

The Opinion of the United States Court of Appeals for the Third Circuit (1a-38a) merely embraces the district court's wholly unsubstantiated impressions that the physicians should be happy to avoid allegations of insurance fraud and should somehow now be happy with this result, even though the Petitioner still has no idea to this very moment where or whether her regularly made retirement contributions even exist. Rhetorically, should not the commencement of the limitations period have been postponed until that question was answered.

The Petitioner lost her entire retirement and no record was ever cultivated nor does any record exist that the Petitioner ever participated or knew about a tax avoidance scheme.

The court of appeals unfairly lumped the Petitioner into a scenario on the basis of 20-20 hindsight. The characterization of the physicians does not equal a decision resulting in a denial of lack of entitlement or a failure to exercise due diligence expected of a reasonable investor.

The court of appeals improvidently embraced the 20-20 hindsight of the district court, when the district court denied the Petitioner due process in its tortured conclusory posture that the IRS notice alone stood as the conclusive pronouncement of wrongdoing.

The court of appeals committed reversible error in blindly following the decision of the district court in formally punishing this Petitioner for as yet unestablished, non-existent putative knowledge and yet let the wrongdoers apparently get away with admitted fraud.

II. This case arises from a summary judgment ruling that a civil RICO claim was barred by the statute of limitations. The United States Court of Appeals for the Third Circuit affirmed. The choice of an accrual rule and an equitable rule for civil RICO claims determines whether the decisions below are correct.

The original complaints in this matter arose directly from the invalidity and illegitimacy of VEBA plans that were developed and marketed in the early 1990s, the history of which can be read in *Neonatology Assocs., v. Comm'r,* 115 T.C. 43, 2000 WL 1048512 (2000), *aff'd* 299 F.3d 221 (3d Cir.2002).

In the 1980s, Donald Murphy and Stephen Ross formed a partnership, Pacific Executive Services ("Murphy Defendants") and sought to sell life insurance policies through VEBAs, which they represented were designed to take advantage of the Tax Reform Act of 1986, Pub.L. 99-514, 100 Stat.2085. Specifically, the Murphy Defendants contrived a scheme where an employer was required to purchase, at an inflated cost, group life insurance for its employees. The annual contributions made by the employers, ostensibly for their employees, were to be tax-deductible and the employees could later convert the group life insurance to individual policies such that any premium overpayments would convert to tax conversion credits.

Under this plan, purchasers were told that they would realize two separate and distinct tax benefits: (1) the professional corporations would be able to deduct the life insurance premium payments; and (2) after converting the group policies to individual policies, the individual employees would obtain the insurance overpayments as conversion credits.

The Murphy Defendants retained Michael Kirwan and Kirwan Financial Group as well as Barry Cohen ("Kirwan Defendants"), to act as "financial advisors," and to assist in the sales and marketing of the VEBAs to small professional businesses. The VEBAs were also endorsed by the Medical Society of New Jersey, a professional organization composed of physicians, in exchange for royalties generated by the sale of the VEBA plans to its members. The Defendants marketed these plans to small businesses, such as those of the Petitioner, because they guaranteed tax deductions.

The VEBA plans came to the attention and were addressed by the IRS which, on June 5, 1995, issued Notice 95-34. Notice 95-34 stated that the IRS did not consider the VEBAs' tax-avoidance mechanism to comply with the Internal Revenue Service code. The Internal Revenue Service asserted that such deductions would be disallowed and that, if litigation were to ensue following its notice, that it would assert this position in any court. In 1994 and 1995 the IRS issued deficiency notices to a number of the participants (Plaintiffs) and began audits of some businesses and individuals who had participated in the VEBA plans. After the IRS issued Notice 95-34, and after the IRS issued its audit notices, Counsel was hired by the Defendants. Counsel drafted correspondence July 12, 1995, which was circulated to the VEBA participants. This letter was further accompanied a memorandum to the VEBA participants. Both communications sought to allay any concerns the participants might have developed in light of the IRS actions, and dissuaded and pursuit of legal action against these Defendants. The letters strongly conveyed the belief that the IRS was incorrect in its position concerning the VEBAs, that the

VEBA plans were completely legitimate, and that no court had ever upheld the IRS' position concerning the validity of the VEBA plans. Specifically, Counsel outlined as follows: "the [I.R.S.] notice appears to be an attempt by the Internal Revenue Service to discourage the proliferation of multiple employee benefit plans . . . Internal Revenue Code § 419(A)(f)(6) was adopted by Congress in 1984. No regulations were ever adopted by the Internal Revenue Service explaining or clarifying § 419(A)(f)(6). The Internal Revenue Service's position is an attempt to redefine Internal Revenue Code § 419 in order to collect revenue. The Internal Revenue Service's position has not been upheld by any Court." It is clear that Counsel did not simply give a generalized opinion concerning the position of the Internal Revenue Service, in fact he provided an unequivocal assurance that the VEBA was structured properly and that all benefits were appropriate.

It was on these written assurances that Plaintiff continued to participate in the VEBA plan, and more importantly, declined to bring suit under RICO at that time.

The IRS began sending deficiency notices to the participants in the VEBA plans, including the Petitioner. On the specific advice of the VEBA Plan Promoters, some of the participants retained Counsel to help them deal with the IRS. Counsel adamantly stood by the assurances and a letter dated August 7, 1996, to the participants, encouraging them to continue participating in the plan. It also outlined a proposal for attacking the IRS' position in Tax Court.

In 2000, the Tax Court did determined that the VEBA plans marketed and sold by defendants impermissibly circumvented the intent and provisions of the Internal Revenue Code. *See Neonatology,* 115 T.C. at 43. Specifically, the court found that the VEBAs were merely "vehicles which were designed and serve in operation to distribute surplus cash surreptitiously (in the form of excess contributions) from the corporations for the employee/owner's ultimate use and benefit." *Id.* at 89. The court also held that the individuals who had contributed to the plans were liable for any accuracy-related negligence penalties under I.R.C. § 6662(a).

The Tax Court's decision eviscerated the Petitioners' VEBA plans, and more importantly, the Petitioners' professional medical corporation was denied deductions that it had taken for the contributions to the plan. The Petitioner was levied a significant tax on her dividend income.

The Petitioner was one of the last two physicians to participate in this particular VEBA program. She began participating and contributing to the VEBA plan in 1990 and she received the *IRS Notice 95-34* in May of 1995, the IRS audit notices in June of 1995, and the Counsel correspondence of Counsel dated July 12, 1995. The Petitioner also received a notice of deficiency from the IRS on October 31, 1995, after which she hired Counsel. The Petitioner received the letter from Prupis dated August 7, 1996. The Petitioner made her last contribution in 1998.

REASONS FOR GRANTING THE PETITION

POINT I

The Accrual of a Civil RICO Action Should Be Equitably Tolled where reasonable diligence would not have revealed an actual injury.

This Court should adopt a uniform accrual rule for civil RICO, under which the four-year statute of limitations is equitably tolled, after a Plaintiff discovers or should have discovered that he has been injured, where reasonable diligence would not have revealed an actual injury.

In enacting RICO, Congress did not include a statute-of-limitations provision for private civil claims arising under the statute. This Court answered this question in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987), holding that civil RICO actions are subject to the four-year statute-of-limitations provision that governs private civil antitrust actions. This Court in *Malley-Duff,* however, did not announce when a civil RICO action "accrues", i.e. the time at which the four-year statute of limitations begins to run.

Although most of the Courts of Appeals at that time applied form of an "injury and pattern discovery rule" for determining the accrual of RICO claims, the United States Court of Appeals for the Third Circuit applied a "last predicate act" exception under which "[if], as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, . . . the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same 'pattern.' " *Keystone Ins. Co. v. Houghton,* 863 F.2d 1125, 1126 (3d Cir.1988). In *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), this Court rejected this exception. This Court reasoned that such a test would result in a limitations period longer than that which Congress could have contemplated, as well as would improperly allow claimants to recover for injuries outside of the limitations period by "bootstrapping" them onto a later and independent predicate act. *Klehr,* 521 U.S. at 187-90.

In *Rotella v. Wood*, 528 U.S. 549 (2000), this Court rejected the "injury and pattern discovery rule" itself, under which the statute of limitations begins to run when the plaintiff knew or should have known that **each element** of a civil RICO claim existed: the injury, the source of the injury, and the pattern of activities prohibited under RICO causing the injury. *Id.* at 554. However, this Court did not "settle upon a final rule," noting that among available remaining alternatives were the injury discovery rule and the injury occurrence rule. *Id.* at 554 n. 2. Recognizing that "a pattern of predicate acts may well be complex, concealed, or fraudulent," the Supreme Court maintained that the justification for a discovery rule does not extend beyond discovery of the injury. *Id.*

Although the Third Circuit's "injury and pattern discovery" rule was no longer viable under *Rotella*, the Third Circuit's reasoning in articulating that rule is instructive. In addressing when a civil RICO cause of action accrues, the Third Circuit has focused on RICO's unique elements and this Court's emphasis on the pattern element as the heart of a RICO claim. *Keystone Insurance Co. v. Houghton,* 863 F.2d 1125, 1128-1129, 1133. The simple (or pure) discovery rule-accrual upon discovery of the injury-has been expressly rejected by the Third Circuit as failing to account for the unique aspects of a civil RICO violation, in particular the pattern element. *See Keystone,* 863 F.2d at 1133-1134. While "[t]he simple discovery rule is an effective rule where the facts indicate that there was one victim and each element and all predicate acts of a RICO violation were present at the same time," *Keystone,* 863 F.2d at 1133, the simple discovery rule would be unfair when the second RICO predicate act, necessary to establish the pattern, occurs more than four years after the plaintiff's injury. *Id.*

As was recognized in *Rotella*, it is a "cardinal principle that a limitations period does not begin to run until the cause of action is complete." 528 U.S. at ___ n. 4, 120 S.Ct. at 1083 n.4; *See Rawlings v. Ray,* 312 U.S. 96, 98 (1941); *see also United States v. Lindsay,* 346 U.S. 568, 569 (1954); *Clark v. Iowa City,* 87 U.S. (20 Wall.) 583, 589, 22 L.Ed. 427 (1874). While this Court expressly declined to decide whether civil RICO permits a cause of action when the second predicate act follows the injury or what limitations accrual rule might apply in that case, that issue was obviously central to the Third Circuit's analysis. *See Keystone,* 863 F.2d at 1131-1134.

In light of the Third Circuit's longstanding application of a discovery accrual rule for civil RICO claims, and combined with the Supreme Court's ruling in *Rotella*, this Court ought properly hold that plaintiffs' civil RICO cause of action accrued when all of the elements of a civil RICO cause of action existed, whether or not discovered, and the plaintiff knew of the existence and source of their injury or should, with the exercise of reasonable diligence, have known of their injury. Such a rule comports with this Court's precedent in *Klehr* and *Rotella,* and recognizes many Circuits' emphasis on the unique elements and statutory purpose of civil RICO. Such a rule does not conflict with this Court's holding in *Klehr v. A.O. Smith Corp.,* 521 U.S. 179 (1997). A single injury that occurs prior to the predicate act that establishes the pattern will be within the statute of limitations.

Post *Rotella,* most circuits, including the United States Court of Appeals for the Third Circuit below, adopted the injury discovery rule. *See Forbes v. Eagleson,* 228 F.3d 471 (3d Cir.2000). *Forbes* held that in determining statute of limitations issues in civil RICO claims "[the Court] must determine when the plaintiffs knew or should have known of their injury." *Id.* at 484. In addition to the injury, the plaintiffs must also have known or should have known of the source of their injury. *Id.* at 485. As the Court explained, "nothing more" than these two requirements "was required to trigger the running of the four-year limitations period [of a civil RICO claim]." *Id.* (citations omitted).

When warning signs make apparent that fraud is possible, i.e. when a Plaintiff "should have known" of an injury such that it can be concluded that, as a matter of law, the Plaintiff can be deemed to have been alerted to the possibility of fraudulent conduct. *See Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 251 n.15 (3d Cir. 2001) (collecting cases). The courts have dubbed such signs "storm warnings," and have established a two-part process for handling a defendant's claim that such precursors should have sufficed to put investors on inquiry notice. *Maggio v. Gerard Freezer & Ice Co.*, 824 F.2d 123, 128 (1st Cir. 1987); *See also, Great Rivers Coop. of Southeastern Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 896 (8th Cir.1997) ("[I]nquiry notice exists when there are 'storm warnings' that would alert a reasonable person of the possibility of misleading information, relayed either by an act or by omission."); *Gray v. First Winthrop Corp.*, 82 F.3d 877, 881 (9th Cir.1996) ("[I]f a prudent person would have become suspicious from the knowledge obtained through the initial prudent inquiry and would have investigated further, a plaintiff will be deemed to have knowledge of facts which would have been disclosed in a more extensive investigation."); *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d Cir.1993) (Plaintiff is on inquiry notice "when a reasonable investor of ordinary intelligence would have discovered the existence of the fraud."); *Caviness v.*

DeRand Res. Corp., 983 F.2d 1295, 1303 (4th Cir.1993) (Inquiry notice exists when the plaintiff "has such knowledge as would put a reasonably prudent purchaser on notice to inquire, so long as that inquiry would reveal the facts on which a claim is ultimately based."); See *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 802-03 (1st Cir. 1987) (holding that plaintiffs are on notice where there are "sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions involved") (*quoting Cook v. Avien, Inc.*, 573 F.2d 685, 697 (1st Cir. 1978); *See also, e.g.,* Lawrence Kaplan, Annotation, *What Constitutes "Inquiry Notice" Sufficient to Commence Running of Statute of Limitations in Securities Fraud Action-Post-Lampf Cases,* 148 A.L.R. Fed. 629, 1998 WL 695966 (1998).

The first step in the analysis requires a court to ascertain whether, when, and to what extent, storm warnings became apparent. This requires a determination as to whether a warning, or series of warnings, should have alerted a similarly situated investor that fraud was in the wind. *Id.* The next step requires the court to determine whether, once storm warnings were apparent, the investor probed the matter in a reasonably diligent manner. *Id.*

The Petitioner contends that this issue lends itself to a more individualized and particularized inquiry which necessarily focuses on the subjective particulars of the investor's claim. *See id.* This question of whether storm warnings were apparent involves issues of fact. *Id.* It is for the factfinder to determine whether a particular collection of data was sufficiently aposematic to place an investor on inquiry notice. *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 368-69 (7th Cir. 1997); *see also Gen. Builders*, 796 F.2d at 12 (stating that this factual question may be determined as a matter of law only when the underlying facts are either admitted or undisputed). Also fact based is the related question of whether a particular plaintiff exercised reasonable diligence in the face of such warnings. *Maggio*, 824 F.2d-at 128; *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 803 (1st Cir. 1987).

Here, the Petitioner could not have known her injuries prior to the Tax Court decision in 2000 which held that the VEBA plans circumvented the Internal Revenue Code, and that prior to that, the injury suffered must not an "actual" injury such that the statute of limitations was triggered.

The *Forbes* standard requires actual, rather than potential, harm to a civil RICO plaintiff. The Petitioner suffered no injuries either from its knowledge of the existence of the IRS Notice in June 1995, the following audits in 1996, or from the risk of injuries stemming from those notices and audit. Until the Tax Court declared the VEBA's to violate the IRS Code, the Petitioner had suffered no actual injuries. Had Plaintiff filed a RICO complaint prior to the Tax Court decision, it would have been dismissed as premature.

RICO's provision of a civil remedy was enacted to "turn [plaintiffs] into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity . . . It would, accordingly, be strange to provide an unusually long basic limitations period that could only have the effect of postponing whatever public benefit civil RICO might realize." *Id.* at 557-58. However, Plaintiff must be provided an adequate opportunity to perform the due diligence required of such a prosecutor to determine actual injuries that are the basis of the suit before it is filed. Plaintiff's proposed "actual injury" standard would allow a civil RICO plaintiff to control when the relevant limitations periods accrue through its timing of the assessment, investigation, and correction of its injuries, thereby producing precisely the long limitations periods frowned upon in *Rotella*.

POINT II

Fraudulent Concealment Ought Properly Equitably Toll RICO Statute of Limitations to Allow Reasonable Inquiry Post-Storm Warnings.

This Court has stated that to equitably toll the running of a limitations period in the civil-RICO context by claiming fraudulent concealment, plaintiffs must have exercised "reasonable diligence" to discover their claim. *Klehr,* 521 U.S. at 194. "Fraudulent concealment is an 'equitable doctrine [that] is read into every federal statute of limitations.' " *Davis v. Grusemeyer,* 996 F.2d 617, 624 (3d Cir.1993); *see also Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946) (holding that equitable doctrine of fraudulent concealment is read into every federal statute of limitations).

In *Rotella,* this Court stated that, "[i]n rejecting pattern discovery as a basic rule, we do not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling, and where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty . . ." *Rotella,* 120 S.Ct. at 1084 (citation omitted). Unlike the discovery rule, which determines the time of the initial commencement of a limitations period, "[e]quitable tolling functions to stop the statute of limitations from running where the claim's accrual date has already passed." *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1387 (3d Cir.1994). Among the circumstances warranting equitable tolling are situations where "the defendant has actively misled the plaintiff respecting the plaintiff's cause of action," *i.e.* fraudulent concealment. *Id.* at 1387. "[W]here the plaintiff has been actively misled . . . the equitable tolling doctrine provides the plaintiff with the full statutory limitations period, starting from the date the facts supporting the plaintiff's cause of action either become apparent to the plaintiff or should have become apparent to a person in the plaintiff's position with a reasonably prudent regard for his or her rights." *Id.* at 1389.

The United States Court of Appeals for the Third Circuit described the differences between the discovery rule inquiry and the equitable tolling inquiry as follows:

> [T]he discovery rule and the equitable tolling doctrine are similar in one respect and different in another. The doctrines are similar in that each requires a level of diligence on the part of the plaintiff; that is, each requires the plaintiff to take reasonable measures to uncover the existence of injury. The plaintiff who fails to exercise this reasonable diligence may lose the benefit of either doctrine. The two doctrines differ, however, with respect to the type of knowledge or cognizance that triggers their respective applications. The discovery rule keys on a plaintiff's cognizance, or imputed cognizance, of ***actual injury.*** Equitable tolling, on the other hand, keys on a plaintiff's cognizance, or imputed cognizance, of the ***facts supporting the plaintiff's cause of action.*** Underlying this difference between the discovery rule and equitable tolling is the more fundamental difference in purpose between the two rules. The purpose of the discovery rule is to determine the accrual date of a claim, for ultimate purposes of determining, as a legal matter, when the statute of limitations begins to run. Equitable tolling . . . presumes claim accrual.

> Equitable tolling steps in to toll, or stop, the running of the statute of limitations in light of established equitable considerations.

Id. at 1390 (emphasis added) (citations and footnotes omitted).

In *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239 (3d Cir. 2001), where the Court rejected an equitable tolling claim after finding that the plaintiff should have known of its injuries, that "[i]n order to avoid summary judgment, there must be a genuine issue of material fact as to whether the Appellants exercised reasonable due diligence in investigating their claim." *Id.* at 257. Additionally, there is authority that reasonable diligence is not required in cases of active concealment. *See, e.g.*, *Martin*, 966 F.2d at 1096 nn.19, 20, 1098; *Lewis v. Herrmann*, 755 F. Supp. 1137, 1148 (N.D. Ill. 1991). The district courts ought therefore properly then focus its inquiry on the specific circumstances of each particular case, including the existence of a fiduciary relationship, the nature of the fraud alleged, the opportunity to discover the fraud, and the subsequent actions of the defendants." Maggio, 824 F.2d at 128; Kennedy, 814 F.2d at 803 (stating that "the exercise of reasonable diligence is determined 'by examining the nature of the misleading statements alleged, the opportunity to discover the misleading statements, and the subsequent actions of the parties' ").

Because the court below granted summary judgment, the burden of proof is initially on Defendants to demonstrate the absence of a genuine issue of material fact surrounding the Plaintiff's discovery of her injury. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). The Defendants essentially argued that the fraud was so obvious that the Petitioner should have discovered her injuries sooner than waiting for the Tax Court decision.

With regard to fraudulent concealment, at the summary judgment stage, a court must determine:

> (1)whether there is sufficient evidence to support a finding that defendants engaged in affirmative acts of concealment designed to mislead the plaintiffs regarding facts supporting their . . .claim, (2) whether there is sufficient evidence to support a finding that plaintiffs exercised reasonable diligence, *and* (3) whether there is sufficient evidence to support a finding that plaintiffs were not aware, nor should they have been aware, of the facts supporting their claim until a time within the limitations period measured backwards from when the plaintiffs filed their complaint.

Forbes, 228 F.3d at 487 (emphasis in original).

The United States Court of Appeals for the Eleventh Circuit has held that "as a general rule, the issue of when a plaintiff in the exercise of due diligence should have known of the basis for his claims is not an appropriate question for summary judgment." *Morton's Market, Inc. v. Gustafson's Dairy, Inc.,* 198 F.3d 823, 832 (11th Cir.1999). *See also Rodriguez-Suris v. Montesinos,* 123 F.3d 10, 16 (1st Cir. 1997) ("If a plaintiff's suspicions that she may have been the victim of a tort are assuaged by assurances made by the person who caused the injury, a plaintiff will not be held responsible for failing to pursue her claim more aggressively.").

The question of whether the statute of limitations begins to accrue on the date that sufficient storm warnings first appear or the later date on which an investor, alerted by storm warnings and thereafter exercising reasonable diligence, would have discovered the fraud. Here, this difference is potentially meaningful.

The Petitioner here satisfied the *Forbes* standard for tolling the limitations period for her RICO claims. Material facts existed that she exercised reasonable diligence in discovering or investigating her injuries. In *Mathews*, the United States Court of Appeals for the Third Circuit stated "to determine what constitutes 'reasonable' due diligence [for determining if a plaintiff should have known of its injury], we must consider the magnitude of the existing storm warnings. The more ominous the warnings, the more extensive the expected inquiry." 260 F.3d at 255. Here, the Petitioner could do no more to investigate the claims than pursue her rights in the Tax Court and await a decision as to the validity of the instruments and the tax deductions.

If a defendant misleads a plaintiff to believe that she does not have a *claim*, the fraudulent concealment doctrine must toll the limitations period. Thus, if the defendant conceals an element of the offense, including but not limited to the injury itself, the four-year period will be tolled. An injury discovery rule that includes equitable tolling approaches an injury and pattern discovery rule, which this court of appeals has rejected. However, the primary difference is that under an equitable tolling regime, which this court of appeals has indicated was appropriate, the decision whether to toll the limitations period for lack of discovery is left to the court's discretion.

POINT III

The *Zenith Radio* Exception Ought Properly Be Found to Apply to The RICO Claims in that Accrual Cannot Occur Prior to Default by Defendants.

The damages resulting from Defendants' misconduct were at best unclear at the time the IRS issues its notices, and the RICO cause of action could not accrue until the fact of financial loss became predictable and non-speculative and thus damages provable. As such, the RICO claims should have been tolled under a fraudulent concealment theory which contemplates actual damages. At no time in the record did the Petitioner ever identify where the monies paid for the policies was placed.

The Petitioner encourages this court to be mindful of the dangers of adopting too broad an interpretation of inquiry notice. *See Law v. Medco Research, Inc.*, 113 F.3d 781, 786 (7th Cir.1997) ("[T]oo much emphasis on the statute of limitations can precipitate premature and groundless suits, as plaintiffs rush to beat the deadline without being able to obtain good evidence of fraud"); *Fujisawa Pharm. Co., Ltd. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir.1997) ("Inquiry notice . . . must not be construed so broadly that the statute of limitations starts running too soon for the victim of the fraud to be able to bring suit."). If a relatively generic enumeration of possible risks, without any meaningful discussion of their magnitude, can be enough to establish inquiry notice at the summary judgment stage, we would encourage a flood of untimely litigation.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-42, 91 S.Ct. 795, 806-08, 28 L.Ed.2d 77 (1971), a case involving alleged antitrust violations, the defendant raised a statute of limitations defense, and argued that many of the purported injuries arose from conduct that occurred more than four years before the plaintiff filed suit. This court rejected the defendant's argument, holding that at the time of the original misconduct, future damages were speculative and unclear and therefore unrecoverable. *See id.* at 339. This court also noted that it would be "contrary to congressional purpose[s]" to foreclose recovery of those damages:

> [R]efusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted.

401 U.S. at 339.

The Petitioner asserts that this case is factually similar to *Zenith Radio*, and that RICO damages were merely speculative at the time of the IRS Tax Notice. In *Maio v. Aetna, Inc.*, 221 F.3d 472 (3d Cir.2000), the court of appeals for the Third Circuit held that a plaintiff lacks standing to bring a RICO claim unless he has suffered a concrete financial loss. *See Maio v. Aetna, Inc.*, 221 F.3d 472 (3d Cir.2000). The Plaintiffs sued their HMO alleging that they had received "inferior health care" treatment, but failed to allege either a denial of medical benefits or actual inferior treatment. The court rejected the plaintiffs' argument, holding that a RICO injury requires "proof that Aetna failed to perform under the parties' contractual arrangement." *Id.* at 490.

Here, the Defendants misrepresented the precise nature of the life insurance agreements and the benefits of purchasing those policies. This led the Petitioner to purchase overpriced life insurance. However, although the Petitioner sustained an injury when she purchased the policies, those damages were not sufficiently concrete until after the Tax Court decision that determined the invalidity of her deductions and the required payments.

A. The Actual Value of the Loss was Not Calculable.

The actual value of the life insurance policies was not readily calculable at the time of the IRS Tax Notice or at any time prior to the Tax Court decision in 2000. "[D]amages are most commonly calculated as the difference between the price paid for a security and the security's 'true value.'" *Sowell v. Butcher & Singer, Inc.*, 926 F.2d 289, 297 (3d Cir.1991). The true value of the life insurance plan could not be determined without a decision as to the validity of it's tax consequences. The policies could not have been valued at any time prior to the Tax Court decision.

B. RICO Injury Is Not Ripe Until A Default Occurs in a Contractual Obligation.

The United States Court of Appeals for the Second Circuit has held that investors were injured when they purchased overpriced limited partnership units based upon the defendant's fraudulent misrepresentations. *See In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 59 (2d Cir.1998). Before that decision, a number of Second Circuit cases held that that a RICO injury did not occur at the time of investment. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 767-68 (2d Cir.1994) (holding that a RICO injury does not occur until a debt becomes uncollectible and the note holder exhausts his contractual remedies); *Cruden v. Bank of New York*, 957 F.2d 961, 977-78 (2d Cir.1992)(holding that a RICO injury does not occur until a debtor defaults on promised principal and equity payments); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103 (2d Cir.1988)(holding that a RICO injury does not occur until it becomes clear that a loan will not be repaid).

The district court in *Merrill Lynch* summarized those cases as follows:

> [They stand] for the proposition that when a creditor has been defrauded, but contractual or other legal remedies remain which hold out a "real possibility" that the debt, and therefore the injury, may be eliminated, RICO injury is speculative, and a RICO claim is not ripe until those remedies are exhausted.

In re Merrill Lynch Ltd. P'ships Litig., 7 F.Supp.2d 256, 263 (S.D.N.Y.1997).

Nonetheless, the court drew a critical distinction between cases involving contractual debt instruments and those involving "equity investments with no basis for recovery other than the limited partnerships' performance." *Id.* The district court in *Merrill Lynch* recognized that in the debt context, a RICO injury occurs only when a debtor defaults on his contractual obligation. 7 F.Supp.2d at 263. Only at that point can an investor be sure that he will not receive the benefit of his bargain.

The Defendants hereinbelow promised tax deductions as part of the transaction. Until those deductions were invalidated, there was no cause of action under RICO. The true market value of the purchased policies could not be determined prior to the Tax Court decision. This case is analogous to those involving contractual agreements, such as debt contracts, where the cause of action cannot accrue until the contract is in default.

The Petitioner's losses did not even approach becoming sufficiently concrete until the Tax Court decision in 2000. The *only* non-speculative way to determine damages would have been to calculate the damages suffered as a result of the Tax Court decision.

Based upon these misrepresentations, the Petitioner believed that they were entitled to those benefits promised until the Tax Court informed them otherwise, and that the VEBA was a safe investment vehicle. Any injury under RICO was purely speculative as long as the real possibility existed that the Petitioner would receive the benefits of the VEBA program. For this reason, no injury was suffered under RICO after receipt of the IRS Notice.

CONCLUSION

In a conscious attempt to turn a phrase in an effort to make a point, there was no stone left unturned thereby leaving no other conclusion that was there was an indisputable obeyance with the law by the Petitioner.

The United States Court of Appeals for the Third Circuit proceeded down a path where there were no signs and if there were signs, those signs were turned in such a way as to misdirect even the most experienced traveler. The United States Court of Appeals for the Third Circuit merely embraced the decision of the district court without ever unearthing the unmittagated and naked instances of fraud throughout.

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

PETER W. TILL
LAW OFFICES OF PETER W. TILL
Attorneys at Law
(*Counsel of Record*)
105 Morris Avenue, Suite 201
Springfield, New Jersey 07081
(973) 258-0064

Attorneys for Petitioner

APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 04-3408, 05-1329, 05-1503, 05-1504

Case No. 04-3408

KAREN CETEL; MORTON SCHNEIDER;
MARVIN CETEL; MARVIN CETEL, M.D., P.A.;
BARBARA SCHNEIDER;
BARBARA SCHNEIDER, M.D., F.A.C.S., P.A.

—v.—

KIRWAN FINANCIAL GROUP, INC.; BARRY COHEN;
MICHAEL KIRWAN; NEIL PRUPIS; LAMPF, LIPKIND,
PRUPIS, PETIGROW & LABUE;
RAYMOND G. ANKNER;
CJA ASSOCIATES; BEAVEN COMPANIES, INC.;
MEDICAL SOCIETY OF NEW JERSEY;
INTER-AMERICAN INSURANCE CO. OF ILLINOIS;
COMMONWEALTH LIFE INSURANCE CO.;
PEOPLES SECURITY LIFE INSURANCE CO.;
MONUMENTAL LIFE INSURANCE CO.;
CAPITAL HOLDING COMPANY;
AEGON INSURANCE GROUP;
INDIANAPOLIS LIFE INSURANCE CO.

(District of New Jersey Civil No. 00-cv-5799)

VIJAY SANKHLA, M.D., on behalf of himself and
others similarly situated

—v.—

COMMONWEALTH LIFE INSURANCE COMPANY;
PEOPLES SECURITY LIFE INSURANCE COMPANY;
PROVIDIAN LIFE INSURANCE COMPANY; AEGON
USA INC.; MONUMENTAL LIFE INSURANCE
COMPANY; INDIANAPOLIS LIFE INSURANCE CO.;
RAYMOND G. ANKNER; BEAVEN COMPANIES, INC.;
CJA AND ASSOCIATES; KIRWAN FINANCIAL GROUP,
INC.; KIRWAN FINANCIAL ADVISORY, INC.; BARRY
COHEN; MICHAEL KIRWAN; PACIFIC EXECUTIVE
SERVICES; STEPHEN R. ROSS; DONALD S. MURPHY;
SEA NINE ASSOCIATE ; DSM, INC.; NEW JERSEY
MEDICAL PROFESSION ASSOCIATION;
SOUTHERN CALIFORNIA MEDICAL PROFESSION
ASSOCIATION; THE MEDICAL SOCIETY OF NEW
JERSEY; NEIL PRUPIS

District of New Jersey Civil No. 01-cv-04781)

Vijay Sankhla, M.D., *Yale Shulman, M.D.,
*Yale Shulman, M.D., P.A., *Boris Pearlman, M.D.
*Denville Radiology, P.A., Marvin Cetel, M.D.,
Karen Cetel, Marvin Cetel, M.D., P.A.,
Barbara Schneider, M.D., Morton Schneider,
Barbara Schneider, M.D. P.A.,
Appellants
*(Pursuant to Rule 12(a), F.R.A.P.)

Case No: 05-1329

KAREN CETEL; MORTON SCHNEIDER;
MARVIN CETEL; MARVIN CETEL, M.D., P.A.;
BARBARA SCHNEIDER;
BARBARA SCHNEIDER, M.D., F.A.C.S., P.A.

—v.—

KIRWAN FINANCIAL GROUP, INC.; BARRY COHEN;
MICHAEL KIRWAN; NEIL PRUPIS; LAMPF, LIPKIND,
PRUPIS, PETIGROW & LABUE; RAYMOND G. ANKNER;
CJA ASSOCIATES; BEAVEN COMPANIES, INC.;
MEDICAL SOCIETY OF NEW JERSEY;
INTER-AMERICAN INSURANCE CO. OF ILLINOIS;
COMMONWEALTH LIFE INSURANCE CO.;
PEOPLES SECURITY LIFE INSURANCE CO.;
MONUMENTAL LIFE INSURANCE CO.;
CAPITAL HOLDING COMPANY; AEGON INSURANCE
GROUP; INDIANAPOLIS LIFE INSURANCE CO.

(District of New Jersey Civil No. 00-cv-5799)

VIJAY SANKHLA, M.D., on behalf of himself and
others similarly situated

—v.—

COMMONWEALTH LIFE INSURANCE COMPANY;
PEOPLES SECURITY LIFE INSURANCE COMPANY;
PROVIDIAN LIFE INSURANCE COMPANY; AEGON
USA INC.; MONUMENTAL LIFE INSURANCE
COMPANY; INDIANAPOLIS LIFE INSURANCE CO.;
RAYMOND G. ANKNER; BEAVEN COMPANIES, INC.;
CJA AND ASSOCIATES; KIRWAN FINANCIAL GROUP,
INC.; KIRWAN FINANCIAL ADVISORY, INC.; BARRY

COHEN; MICHAEL KIRWAN; PACIFIC EXECUTIVE
SERVICES; STEPHEN R. ROSS; DONALD S. MURPHY;
SEA NINE ASSOCIATE ; DSM, INC.;
NEW JERSEY MEDICAL PROFESSION ASSOCIATION;
SOUTHERN CALIFORNIA MEDICAL PROFESSION
ASSOCIATION; THE MEDICAL SOCIETY OF NEW
JERSEY; NEIL PRUPIS

(District of New Jersey Civil No. 01-cv-04781)

Marvin Cetel, M.D., Karen Cetel,
Marvin Cetel, M.D., P.A., Barbara Schneider, M.D.,
Morton Schneider, Barbara Schneider, M.D. P.A.,
Appellants

Case No: 05-1503

KAREN CETEL; MORTON SCHNEIDER; MARVIN
CETEL; MARVIN CETEL, M.D., P.A.;
BARBARA SCHNEIDER;
BARBARA SCHNEIDER, M.D., F.A.C.S., P.A.

—v.—

KIRWAN FINANCIAL GROUP, INC.; BARRY COHEN;
MICHAEL KIRWAN; NEIL PRUPIS; LAMPF, LIPKIND,
PRUPIS, PETIGROW & LABUE; RAYMOND G. ANKNER;
CJA ASSOCIATES; BEAVEN COMPANIES, INC.;
MEDICAL SOCIETY OF NEW JERSEY;
INTER-AMERICAN INSURANCE CO. OF ILLINOIS;
COMMONWEALTH LIFE INSURANCE CO.;
PEOPLES SECURITY LIFE INSURANCE CO.;
MONUMENTAL LIFE INSURANCE CO.;
CAPITAL HOLDING COMPANY; AEGON INSURANCE
GROUP; INDIANAPOLIS LIFE INSURANCE CO.

(District of New Jersey Civil No. 00-cv-5799)

VIJAY SANKHLA, M.D., on behalf of himself and
others similarly situated

—v.—

COMMONWEALTH LIFE INSURANCE COMPANY;
PEOPLES SECURITY LIFE INSURANCE COMPANY;
PROVIDIAN LIFE INSURANCE COMPANY; AEGON
USA INC.; MONUMENTAL LIFE INSURANCE
COMPANY; INDIANAPOLIS LIFE INSURANCE CO.;
RAYMOND G. ANKNER; BEAVEN COMPANIES, INC.;
CJA AND ASSOCIATES; KIRWAN FINANCIAL GROUP,
INC.; KIRWAN FINANCIAL ADVISORY, INC.; BARRY
COHEN; MICHAEL KIRWAN; PACIFIC EXECUTIVE
SERVICES; STEPHEN R. ROSS; DONALD S. MURPHY;
SEA NINE ASSOCIATE ; DSM,
INC.; NEW JERSEY MEDICAL PROFESSION
ASSOCIATION; SOUTHERN CALIFORNIA MEDICAL
PROFESSION ASSOCIATION; THE MEDICAL SOCIETY
OF NEW JERSEY; NEIL PRUPIS

(District of New Jersey Civil No. 01-cv-04781)

Donald S. Murphy, Pacific Executive Services, DSM, Inc.,
Appellants

Case No: 05-1504

KAREN CETEL; MORTON SCHNEIDER; MARVIN
CETEL; MARVIN CETEL, M.D., P.A.;
BARBARA SCHNEIDER;
BARBARA SCHNEIDER, M.D., F.A.C.S., P.A.

—v.—

KIRWAN FINANCIAL GROUP, INC.; BARRY COHEN;
MICHAEL KIRWAN; NEIL PRUPIS; LAMPF, LIPKIND,

PRUPIS, PETIGROW & LABUE; RAYMOND G. ANKNER;
CJA ASSOCIATES; BEAVEN COMPANIES, INC.;
MEDICAL SOCIETY OF NEW JERSEY;
INTER-AMERICAN INSURANCE CO. OF ILLINOIS;
COMMONWEALTH LIFE INSURANCE CO.;
PEOPLES SECURITY LIFE INSURANCE CO.;
MONUMENTAL LIFE INSURANCE CO.;
CAPITAL HOLDING COMPANY; AEGON INSURANCE
GROUP; INDIANAPOLIS LIFE INSURANCE CO.

(District of New Jersey Civil No. 00-cv-5799)

VIJAY SANKHLA, M.D., on behalf of himself and
others similarly situated

—v.—

COMMONWEALTH LIFE INSURANCE COMPANY;
PEOPLES SECURITY LIFE INSURANCE COMPANY;
PROVIDIAN LIFE INSURANCE COMPANY; AEGON
USA INC.; MONUMENTAL LIFE INSURANCE
COMPANY; INDIANAPOLIS LIFE INSURANCE CO.;
RAYMOND G. ANKNER; BEAVEN COMPANIES, INC.;
CJA AND ASSOCIATES; KIRWAN FINANCIAL GROUP,
INC.; KIRWAN FINANCIAL ADVISORY, INC.; BARRY
COHEN; MICHAEL KIRWAN; PACIFIC EXECUTIVE
SERVICES; STEPHEN R. ROSS; DONALD S. MURPHY;
SEA NINE ASSOCIATE; DSM, INC.; NEW JERSEY
MEDICAL PROFESSION ASSOCIATION;
SOUTHERN CALIFORNIA MEDICAL PROFESSION
ASSOCIATION; THE MEDICAL SOCIETY OF
NEW JERSEY; NEIL PRUPIS

(District of New Jersey Civil No. 01-cv-04781)

Monumental Life Insurance Company,
Commonwealth Life Insurance Company,
Capital Holding Corporation, and AEGON USA, Inc.,
Appellants

On Appeal from the United States District Court
for the District of New Jersey

(D.C. Nos. 00-cv-5799, 01-cv-4781)
District Judge: The Honorable Anne E. Thompson

ARGUED APRIL 24, 2006

BEFORE: SCIRICA, *Chief Judge,*
and NYGAARD, *Circuit Judge,*
and YOHN,* *District Judge.*

(Filed August 28, 2006)

---

* Honorable William H. Yohn, Jr., Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Mark J. Oberstaedt, Esq. (Argued)
Stephen J. Fram, Esq.
Archer & Greiner
One Centennial Square
P. O. Box 3000
Haddonfield, NJ 08033

Counsel for Appellants/Cross Appellees

Kevin L. Smith, Esq. (Argued)
Hines Smith
3080 Bristol Street, Suite 540
Costa Mesa, CA 92626

Charles L. Becker, Esq.
Reed Smith
1650 Market Street 2500
One Liberty Place
Philadelphia, PA 19103-7301

Counsel for Appellee/Cross Appellant
Comm Life Ins. Co., et al.

Christopher P. Leise, Esq. (Argued)
White & Williams
457 Haddonfield Road
Suite 400 Liberty View
Cherry Hill, NJ 08034

Elizabeth A. Venditta, Esq.
Edward M. Koch, Esq.
White & Williams
One Liberty Place, Suite 1800
Philadelphia, PA 19103

Counsel for Appellee/Cross Appellant
Pacific Executive Serv., et al.

Walter F. Kawalec, III, Esq. (Argued)
Larry I. Zucker, Esq.
Marshall Dennehey Warner Coleman & Goggin
200 Lake Drive East
Woodland Falls Corporate Park, Suite 300
Cherry Hill, NJ 08002

Counsel for Appellee/Cross Appellant
Medical Society of NJ

Richard L. Hertzberg, Esq. (Argued)
Greenbaum Rowe Smith & Davis
P. O. Box 5600
Metro Corporate Campue One
Woodbridge, NJ 07095

Alain Leibman, Esq.
Stern & Kilcullen
75 Livingston Avenue
Roseland, NJ 07068

Counsel for Appellee/Cross Appellant
Raymond G. Ankner, et al.

William P. Marshall, Esq.
3101 Trewigton Road
P. O. Box 267
Colmar, PA 18915

Counsel for Appellee Barry Cohen

Michael Kirwan
1249 Knox Drive
Yardley, PA 19067

Pro Se

OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

Appellants/Plaintiffs are physicians and their professional corporations who purchased life insurance through Voluntary Employee Beneficiary Associations ("VEBAs") created, marketed, operated, and endorsed by Appellees/Defendants, a number of individuals, corporations, and associations connected to the VEBAs.[1] They claim that defendants misrepresented the potential tax benefits of the VEBAs to induce them to purchase the life insurance policies. After the Internal Revenue Service decided that the VEBAs did not possess the tax benefits, plaintiffs brought civil RICO, ERISA, and state law causes of action against defendants. The District Court granted defendants' motions for summary judgment. We will affirm.

I. FACTS

This case involves a protracted disagreement over the validity and legitimacy of VEBA plans that were developed and marketed in the early 1990s, the history of which can be read in *Neonatology Assocs., v. Comm'r*, 115 T.C. 43 (2000), *aff'd* 299 F.3d 221 (3d Cir. 2002). Sometime in the mid-1980s, Donald Murphy and Stephen Ross formed a partnership called Pacific Executive Services ("Murphy Defendants") and sought to sell life insurance policies through VEBAs specially designed to take advantage of the Tax Reform Act of 1986, Pub.L. 99-514, 100 Stat. 2085. The Murphy

---

[1] We refer herein to the parties simply as "plaintiffs" and "defendants."

Defendants believed that the Tax Reform Act allowed them to market and sell life insurance policies through the tax-exempt VEBAs, creating a scheme by which they could sell more insurance policies by coupling them with the tax benefits of the VEBAs. Specifically, the Murphy Defendants conceived the scheme so as to require an employer to purchase, at an inflated cost, group life insurance for its employees. The annual contributions made by the employers (purportedly for their employees) were to be tax-deductible and the employees could later convert the group life insurance to individual policies such that any premium overpayments would convert to tax conversion credits. Under the Murphy Defendants' plan, purchasers could realize two distinct tax benefits: (1) the professional corporations would be able to deduct the life insurance premium payments; and (2) after converting the group policies to individual policies, the individual employees would obtain the insurance overpayments as conversion credits.

To facilitate this plan, the Murphy Defendants engaged Michael Kirwan and Kirwan Financial Group as well as Barry Cohen ("Kirwan Defendants"), to act as "financial advisors," and to assist in the sales and marketing of the VEBAs to small professional businesses. As noted earlier, the money-making hook for the VEBAs was selling more life insurance policies. As such, the Murphy and Kirwan Defendants initially sold Continuous Group ("C-Group") life insurance policies[2] created by Raymond Ankner and supplied by his non-party company Inter-American Insurance Company. However, Inter-American lost financial stability and, in 1991, Ankner convinced a number of insurance sales companies ("Monumental Defendants")[3] to supply the C-Group policies. Consequently, the Monumental Defendants entered into a series of sales and marketing agreements with the Murphy and Kirwan Defendants. Additionally, in connection with the Murphy and Kirwan Defendants' attempts at marketing and promotion, the VEBAs were also endorsed by the Medical Society of New Jersey, a professional organization composed of physicians, in exchange for royalties generated by the sale of the VEBA plans to its members.

---

[2] C-Group life insurance policies "masquerade as a policy that provides only term life insurance benefits in order to make the product marketable to targeted investors." *See Neonatology*, 115 T.C. at 53. However, the policy is actually a universal life policy comprised of two distinct but related policies. The first—the accumulation phase—is a group term policy known as the C-group term policy. The second—the payout phase—is an individual universal policy known as the "C-group conversion universalife" policy. *Id.*

With this framework in place, defendants began marketing these plans to small businesses. Because they promised significant tax avoidance, the plans were appealing, and several businesses and employers purchased the VEBA plans from defendants. One such company was Lakewood Radiology, P.C., and its partners, plaintiffs Vijay Sankhla, Yale Shulman, and Boris Pearlman (collectively, the "Sankhla physicians"). After Cohen and Kirwan recommended that Lakewood participate in the VEBA scheme, the professional corporation agreed. Another corporation to be convinced by Cohen and Kirwan was that of Cetel and Schenider ("Cetel physicians"), who agreed to participate both individually and through their professional corporation. Both of these corporations, and the doctors, individually, began making contributions to the VEBA plan in or around 1990. Moreover, all of the plaintiffs had dealings, in some capacity with Kirwan and Cohen, who became plaintiffs' financial advisors, in all relevant respects, for questions concerning the VEBA plans. Additionally, plaintiffs also came to know Neil Prupis, who was hired as an attorney by the Murphy Defendants.

---

[3] The Monumental Defendants include Commonwealth Life Insurance Company, Monumental Life Insurance, People Security Life, Capital Holding Company, Providence Life Insurance, and AEGON USA, Inc.

However, the VEBA plans came to the attention of the IRS which, on June 5, 1995, issued Notice 95-34. Notice 95-34 stated that the IRS did not consider the VEBAs' tax-avoidance mechanism to comply with the tax code. It asserted that such deductions would be disallowed and that, if litigation were to ensue, it would assert this position in court. Moreover, in 1994 and 1995 the IRS issued deficiency notices to a number of the participants and also began audits of some businesses and individuals who had participated in the VEBA plans. After the IRS issued Notice 95-34, and after the IRS issued its audit notices, Prupis was hired by the Murphy Defendants. He drafted a letter to Cohen on July 12, 1995, which Cohen circulated to the VEBA participants. This letter accompanied a memorandum from Cohen and Kirwan to the VEBA participants. Both communications sought to allay any concerns the participants might have developed in light of the IRS actions. To wit, the letters strongly conveyed the belief that the IRS had taken an incorrect position, that the VEBA plans were completely legitimate, and that no court had ever upheld the IRS' position concerning the validity of the VEBA plans. Nonetheless, the IRS began sending deficiency notices to the participants. Then, at the advice of Cohen and Kirwan, some of the participants retained Prupis as their attorney to help them deal with the IRS. Cohen and Prupis stood by their earlier assurances and a letter dated August 7, 1996, to the participants, encouraging them to continue participating in the plan. It also outlined a proposal for attacking the IRS' position in Tax Court.

As it turned out, in 2000 the Tax Court did indeed determine that the VEBA plans marketed and sold by defendants impermissibly circumvented the intent and provisions of the Internal Revenue Code. *See Neonatology,* 115 T.C. at 43. Specifically, the court found that the VEBAs were merely "vehicles which were designed and serve in operation to distribute surplus cash surreptitiously (in the form of excess contributions) from the corporations for the employee/owner's ultimate use and benefit." *Id.* at 89. The Court also held that the individuals who had contributed to the plans were liable for any accuracy-related negligence penalties under I.R.C. § 6662(a). This decision all but invalidated plaintiffs' VEBA plans, and plaintiffs' professional medical corporations were denied deductions they had taken for the contributions to the plan; as well, the individual participants were levied a significant tax on their dividend income.

The District Court found that the New Jersey Consumer Fraud Act did not cover plaintiff's allegations and also dismissed certain ERISA claims for lack of standing. The District Court granted summary judgment for all claims on statute of limitations grounds. Because the District Court's order and our review hinge on a thorough grasp of the predicate facts concerning plaintiffs' knowledge at all relevant times, we will review these facts as they relate to each individual plaintiff.

Dr. Sankhla

Vijay Sankhla practices radiology with Lakewood Radiology, P.A. Upon becoming a partner with the Lakewood group in 1995, Sankhla began participating in and made contributions to the VEBA plan. He continued making payments to the plan for five years, until 2000. He was never audited by the IRS and claims he never saw their Notice 95-34. However, his employer was audited for its contributions to the VEBA plan, and he was subpoenaed in March 1995 in connection with this audit. Additionally, Sankhla admitted that he learned of the audits in mid-1995 and that he discussed the audits with his radiology partners. Consequently, he contacted Barry Cohen, the Lakewood Radiologists' VEBA plan financial advisor, and inquired about how the audits would affect him. Cohen assured him that "his previous VEBA contributions were entirely safe" but expressed a certain discomfort with one of the VEBA plans. He additionally told Sankhla that "we are going to win the [*Neonatology*] case," apparently in an effort to assure Sankhla of the safety of his investments. Moreover, he advised Sankhla that the only way to guarantee the safety of his previous VEBA plan investments would be to continue to make contributions to it for another three years, to enable him to make tax-free withdrawals. By 2000, however, Sankhla could not get an adequate answer from Cohen concerning the propriety of continued participation in the VEBA plan and so decided to discontinue contributions to the plan.

Dr. Pearlman

Boris Pearlman, also a partner with Lakewood Radiology. He participated in and made contributions to the VEBA plan from 1991 until 1999. Like Sankhla, he terminated his participation in 2000. Pearlman also contends that he never saw the IRS Notice 95-34, although he did receive the July 1995 letter from Cohen and Kirwan. He also received a copy of the letter from Prupis. In addition, Pearlman received notice of an audit in June or July of 1995 and an IRS examination report. However, Pearlman contends that he did not receive a deficiency notice from the IRS until sometime after September 16, 1996.

After he received the IRS audit notice, Pearlman contacted Cohen and Prupis with his concerns. In response Cohen and Prupis both assured Pearlman that the "IRS had no case" and that the VEBA plans were legitimate and would continue to be so. Pearlman was apparently convinced by these avowals and continued to invest in the VEBA plan. After the Tax Court effectively invalidated the VEBA scheme in 2000, Pearlman quit contributing to the plan.

Dr. Shulman

A third partner at Lakewood Radiology, Yale Shulman participated in the VEBA plan from 1993 until 1998. Shulman was on the board of the Medical Society of New Jersey at the time that the Medical Society approved Cohen and Kirwan's VEBA plan scheme. He also received a copy of Cohen and Kirwan's 1995 letter, and Prupis' legal opinion concerning the VEBA plan. Cohen and Kirwan then advised Shulman that he should retain attorney Prupis to represent him in connection with any impending IRS action. Shulman did so.

In late 1996, Shulman was audited by the IRS, which, in 1997, assessed penalties and taxes against Shulman for his contributions to the VEBA plan. Evidently still believing the plan to be legitimate, Shulman continued making contributions until 1998.

Drs. Cetel and Schneider

Marvin Cetel and Barbara Schneider are the last two physicians to participate in this particular VEBA scheme. They began participating and contributing to the VEBA plan in 1990 and both received the IRS Notice 95-34 in May of 1995, the IRS audit notices in June of 1995, and the Prupis and Cohen letter of July 12, 1995.

Schneider also received a notice of deficiency from the IRS on October 31, 1995, after which she hired Prupis as her attorney. Both physicians also received the letter from Prupis dated August 7, 1996. Schneider made her last contribution in 1998 and Cetel made his last contribution in 1997.

II. PROCEDURAL HISTORY

This appeal comprises actions that were initially filed as two separate putative class actions (the Cetel action, filed on July 20, 2000 and the Sankhla action, filed on September 6, 2001).[4] Recognizing the importance of the *Neonatology* action for the future of their investments in the VEBA plan, both the Cetel physicians and the Sankhla physicians sought, and were granted, leave to participate as *amici curiae* in the *Neonatology* appeal to the Court of Appeals for the Third Circuit. *Neonatology Assocs. v. Comm'r.*, 293 F.3d 128 (3d Cir. 2002). After the Tax Court's decision was affirmed, 299 F.3d 221 (3d Cir. 2002), plaintiffs sued defendants, alleging violations of ERISA, RICO, and various state law claims, including the New Jersey RICO statute and the New Jersey Consumer Fraud Act. Although the actions were initially filed separately in New Jersey state court, both were removed to the United States District Court for the District of New Jersey on the basis of the ERISA claims.

On July 8, 2002, the District Court dismissed the Sankhla physicians' state law claims as being preempted by section 514(a) of ERISA, 29 U.S.C. § 1144(a), and on November 25, 2002, consolidated the two cases.[5]

---

[4] Pearlman and Shulman joined the Sankhla suit in March 2002.

[5] Both suits named the same set of defendants: Barry Cohen, Michael Kirwan and Kirwan Financial Group, the Medical Society of

After completion of discovery, defendants filed a motion for summary judgment, seeking to dismiss plaintiffs' remaining ERISA claims and their civil RICO claims.

The District Court, in an order dated March 2, 2004, first reversed itself on the issue of ERISA preemption, reinstating plaintiffs' state law claims but declining to finally resolve them, and then granted defendants' motion for summary judgment on plaintiffs' federal RICO claims and most of the ERISA claims. The District Court held the RICO claims time-barred. Applying the four-year statute of limitations period established by the Supreme Court in *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed.2d 121 (1987) along with the "injury discovery rule" adopted by our Court in *Mathews v. Kidder Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001), the District Court determined that plaintiffs should have been on notice of their injuries, at the latest, in 1995 after the IRS issued Notice 95-34 and began its audits of the VEBA plan participants. With respect to plaintiffs' ERISA claims, the District Court held that the counts relating to §§ 409 and 502(a) of ERISA, 29 U.S.C. §§ 1109(a) and 1132(a)(2), should be dismissed for lack of standing because plaintiffs sought to recover benefits owed to them in their individual capacities and not on behalf of their employer plans. The District Court also dismissed both parties' attempts to import the findings of *Neonatology* to bind each other, employing its broad discretion to determine that collateral estoppel should be denied based on the complexity of the case. Finally, the District Court granted summary judgment to defendants on plaintiffs' "benefit-of-the-bargain" theory of recov-

---

New Jersey, Raymond Ankner and his companies, Commonwealth Life Insurance Company and related entities, and Neil Prupis, Esquire.

ery. The District Court opined that such damages would be highly speculative and would result in the enforcement of an illegal tax-avoidance scheme.

In a third opinion dated July 16, 2004, the District Court granted defendants' motion for summary judgment on all of the reinstated state law claims and the remaining ERISA and New Jersey RICO claims and denied plaintiffs' motion for reconsideration of its March 2, 2004 opinion.[6] The District Court held the surviving ERISA claims under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), for breach of fiduciary duty to be time-barred. The Court concluded that plaintiffs had actual knowledge of their fiduciary-breach allegations when, in 1995, the IRS sent out Notice 95-34 and began its audits of the VEBA plan participants. The District Court, noting that the federal RICO statute served as a model for the state corollary and in the absence of any governing state law to the contrary, concluded that a four-year statute of limitations, analogous to that in the federal Act, controlled the New Jersey RICO claims. It held that this statute of limitations began running by the summer of 1995, when all of the plaintiffs had learned of the IRS Notice 95-34 or had learned that the IRS had audited or was going to audit the personal accounts of the participants. Moreover, the District Court held that plaintiffs failed to undertake reasonable inquiries into the alleged fraud, vitiating their reliance on New Jersey's discovery rule as support for their claim that the statute of limitations should be equitably tolled. The District Court also rejected plaintiffs' claim that the statute of limitations did not begin to run until they suffered actual damages, concluding that under New Jersey law, fraud claims like those premised on the New Jersey

---

[6] The District Court's dismissal of plaintiffs' breach of contract and unjust enrichment claims are not appealed.

RICO statute did not require a knowledge of actual damages.[7] Finally, the District Court dismissed plaintiffs' Consumer Fraud Act claim, opining that, as a matter of law, the terms and scope of the CFA could not apply to the sale and purchase of the VEBA plans because, absent a clear indication by New Jersey courts otherwise, the CFA did not intend to cover the sale and purchase of the complex tax-avoidance schemes at issue here.

The disposition of this third opinion did leave certain common law state claims intact, but plaintiffs entered into a settlement agreement concerning these claims shortly thereafter and the District Court entered a final Order of Dismissal. Plaintiffs timely appeal from this Order and we have jurisdiction pursuant to 28 U.S.C. § 1291. We review decisions granting summary judgment de novo, applying the same legal standard as the trial court to the same record. *Omnipoint Comm'cns Enters., L.P. v. Newtown Twp.*, 219 F.3d 240, 242 (3d Cir. 2000). Summary judgment can only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

---

[7] The District Court applied the same reasoning to the Sankhla Plaintiffs' state law fraud-based claims, including fraud (Count XII), breach of fiduciary duty (Count XIV), breach of good faith and fair dealing (Count XVI), respondeat superior (Count XVII), conspiracy and aiding and abetting fraudulent misrepresentation (Count XVIII) and the physicians' negligent misrepresentation claim (Count XIII). The District Court held that these claims had a six-year statue of limitations but, because the Sankhla physicians filed their claims in September 2001 and the date of accrual was, at the latest August 1995, these were also time barred.

III. Discussion

A.

We will quickly dispose of a preliminary waiver issue. Plaintiffs argue that when certain defendants filed their answers to the complaint they failed to raise the issue of the statute of limitations, instead taking the position that the claims asserted were not ripe because the Tax Court litigation had yet to conclude. In essence, plaintiffs make a waiver argument. The District Court rejected it, applying the statute of limitations to bar all pertinent claims against all defendants. We review the District Court's decision for abuse of discretion and we will affirm on this point. *Oddi v. Ford Motor Co.,* 234 F.3d 136, 146 (3d Cir.), *cert. den.* 532 U.S. 921 (2000). It is true that "parties should generally assert affirmative defenses early in litigation, so they may be ruled upon, prejudice may be avoided, and judicial resources may be conserved." *Robinson v. Johnson,* 313 F.3d 128, 134 (3d Cir. 2002). However, there is no hard and fast rule limiting defendants' ability to plead the statute of limitations. Accordingly, affirmative defenses can be raised by motion, at any time (even after trial), if plaintiffs suffer no prejudice. *Charpentier v. Godsil,* 937 F.2d 859, 863–64 (3d Cir. 1991). Here, the District Court determined, and we agree, that plaintiffs suffered no undue prejudice because they had notice that the statute of limitations was an issue for the simple reason that other defendants had pleaded in their answer that the claims were time-barred. Because plaintiffs were on sufficient notice, it did not inhibit their ability to gauge and respond to all the possible defenses. The District Court was well within the bounds of its discretion to allow defendants to plead the statute of limitations even if they had not done so in their initial answers.

B. Federal RICO Claims

Turning to the substance of plaintiffs' appeal, the first issue we address is whether the District Court erred when it dismissed plaintiffs' federal RICO claims as time-barred. Plaintiffs do not contest that civil RICO actions are subject to a four-year statute of limitations. *See Forbes v. Eagleson*, 228 F.3d 471 (3d Cir. 2000). Rather, they recognize that the dispositive question concerning the federal RICO claims here is whether plaintiffs were on "inquiry notice" of their injuries by August 1995. In determining when a RICO claim accrues, we apply an injury discovery rule "whereby a RICO claim accrues when plaintiffs knew or should have known of their injury." *Mathews v. Kidder Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001) (quoting *Forbes*, 228 F.3d at 484). As we noted in *Mathews*, this rule has "both subjective and objective" components and, with respect to the subjective, "a claim accrues no later than when the plaintiffs themselves discover their injuries." *Id.* However, because the components are disjunctive we first perform an objective inquiry to determine when plaintiffs should have known of the basis of their claims, which "depends on whether [and when] they had sufficient information of possible wrongdoing to place them on 'inquiry notice' or to excite 'storm warnings' of culpable activity." *Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 400 (3d Cir. 2006) (internal quotations omitted). Moreover, plaintiffs have inquiry notice "whenever circumstances exist that would lead a reasonable investor of ordinary intelligence, through the exercise of due diligence, to discovery of his or her injury." *Mathews*, 260 F.3d at 252.

In determining inquiry notice, our analysis proceeds in two steps. First, the burden is on the defendant to show the existence of "storm warnings." *Id.* Storm warnings have not been exhaustively catalogued, but they are essentially any information or accumulation of data "that would alert a reasonable person to the probability that misleading statements or significant omissions had been made." *Id.* This is an objective inquiry and hinges not on a plaintiff's actual awareness of suspicious circumstances or even on the ability of a plaintiff to understand their import. Instead, "[i]t is enough that a reasonable investor of ordinary intelligence would have discovered the information and recognized it as a storm warning." *Id.* This charge saddles the investor with responsibilities like reading prospectuses, reports, and other information related to the investments, *Mathews*, 260 F.3d at 252, and, additionally, assumes knowledge of "publicly available news articles and analyst's reports." *Benak*, 435 F.3d at 400 quoting *Lui v. Credit Suise First Boston Corp.* (*In re Initial Public Offering Sec. Litig.*), 341 F. Supp.2d 328, 345 (S.D.N.Y. 2004)). Once determined, the second step then shifts the burden to plaintiffs to show that, heeding the storm warnings, they exercised reasonable diligence but were unable to find and avoid the storm. *Mathews*, 260 F.3d at 252; *Benak*, 435 F.3d at 400.

Here, we conclude that the District Court correctly decided that sufficient storm warnings existed by August 1995 to satisfy the first prong of our inquiry notice analysis. By August 1995, the IRS had circulated Notice 95-34, which informed plaintiffs that the IRS had not approved the deduction contributions to VEBA plans and, in fact, had actually disallowed these deductions.

The Notice made clear that the VEBA plans were inconsistent with the tax code. Additionally, in 1995 the Medical Society stopped endorsing the VEBA plans and the IRS undertook audits of some of the plaintiffs, amassing even more troubling storm clouds. All this information, taken together, establishes with enough objective certainty that storm warnings did exist concerning the lawfulness of the VEBA plans, thus satisfying the first step.[8]

With respect to the second step, there is little doubt that plaintiffs exercised scant, if any, diligence in attempting to discover their injuries. The District Court appropriately commented that:

> [i]t seems incredible . . . to argue they relied solely on the defendants' assurances of a "victory" over the IRS in the Tax Court . . . . Asking the defendants whether the plans were legal does not constitute reasonable due diligence . . . . [A] reasonable person would not continue to participate in a tax avoidance scheme after the IRS issues a notice condemning such plans, and that person was the subject of an IRS audit of his participation in that plan.

By all accounts, plaintiffs' only effort to discover their injuries was to inquire about the validity of the plans with Cohen and Prupis, both defendants in this dispute and also, at the time, involved in the running and operation of the plan. Both Cohen and Prupis continued to assure plaintiffs that the plans were legitimate and "would be upheld in the courts." In *Mathews*, we addressed a similar degree of diligence and concluded that it did not constitute the exercise of due diligence expected of reasonable investors. There, plaintiffs sent a letter to defendants inquiring into the state of their investment. Defendants responded that they "remain[ed] confident in the underlying value of the . . . assets and believe[d] this value will be realized once the[ ] markets turnaround." *Mathews*, *260* F.3d at *255*. Plaintiffs in *Mathews* argued that this inquiry constituted reasonable diligence, but we rejected that argument, stating:

---

[8] We decline to treat Sankhla differently from any of the other plaintiffs in determining that sufficient storm warnings were sounding by August 1995. The fact that Sankhla may have never seen the IRS' Notice or heard of the audits does not save him from attribution of inquiry notice because, as noted earlier, his employer was audited and he was subpoenaed in connection to this audit in March 1995. Moreover, he admitted that he had learned of the audits of his other Lakewood Radiology partners by mid-1995 and that he had discussed the audits and their implications with his partners. Thus, the existence of storm warnings by August 1995 applies to all plaintiffs, including Sankhla.

> Reasonable due diligence does not require a plaintiff to exhaust all possible avenues of inquiry. Nor does it require the plaintiff to actually discover his injury. At the very least, however, due diligence does require plaintiffs to do something more than send a single letter to the defendant.

Id. at *255*.

This analysis guides our conclusion here. Merely asking defendants whether the plans were legal is inadequate to show reasonable diligence. As we noted in *Mathews* and reiterate here, plaintiffs who undertake no diligence beyond superficial inquiry of defendants concerning the validity or propriety of their investments cannot obtain the benefit that a finding of reasonable diligence will confer. Accordingly, plaintiffs have not met their portion of the burden-shifting requirement under our inquiry-notice analysis and thus cannot defeat the finding that they were on inquiry notice by August 1995 and, by extension, that their claims accrued as of that date. *See id.; In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002).

Plaintiffs submit, however, that even if their claims accrued by August 1995, the District Court should have tolled the statute of limitations because defendants fraudulently concealed the VEBA scheme and therefore prevented plaintiffs from discovering their injuries. It is true that "[f]raudulent concealment is an equitable doctrine that is read into every federal statute of limitations[,]" *Mathews,* 260 F.3d at 256 (quoting *Davis v Grusemeyer,* 996 F.2d 617, 624 (3d Cir. 1993), and additionally, that it will toll the RICO limitation period "where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it." *Id.* (quoting *Rotella v. Wood,* 528 U.S. 549, 561, (2000). But, to benefit from the equitable tolling doctrine, plaintiffs have the burden of proving three necessary elements: (1) that the defendant actively misled the plaintiff; (2) which prevented the plaintiff from recognizing the validity of her claim within the limitations period; and (3) where the plaintiff's ignorance is not attributable to her lack of reasonable due diligence in attempting to uncover the relevant facts. *Mathews,* 260 F.3d at 256.

Plaintiffs' claim fails on the third element. As discussed above, plaintiffs did not exercise the due diligence expected of a reasonable investor because they failed to undertake any investigation into the meaning of the storm warnings beyond asking defendants whether their plans were legitimate. As in *Mathews,* a finding that plaintiffs did not exercise reasonable diligence for the determination of when the claim accrues will also likely foreclose the possibility of equitable tolling. *Id.* at 257 ("In order to avoid summary judgment, there must be a genuine issue of material fact as to whether the

Appellants exercised reasonable due diligence in investigating their claim).[9]

Finally, with respect to the federal RICO claims, plaintiffs contend that under basic contract law, the accrual date could only occur when a default in the contractual obligation occurs. The District Court properly rejected this claim, holding that "plaintiffs have failed to proffer sufficient evidence that defendants breached any contractual obligation" and that "plaintiffs have not pointed to any contractual provision or duty that obligated Defendants to provide tax benefits." Unlike in the creditor-debtor context, where an injury may not accrue unless and until the debtor defaults on some contractual obligation, *see Cruden v. Bank of New York*, 957 F.2d 961, 967 (2d Cir. 1992), there simply is no contractual obligation upon which one of the parties could have defaulted. In short, there is no contractual claim, and plaintiffs' attempt to reframe their RICO claims in this vein appropriately must fail.

C. New Jersey RICO Claims

Plaintiffs next object to the District Court's application of a four-year statute of limitations to their New Jersey RICO claims as opposed to a six-year limitations period. Although they concede that some New Jersey courts have applied the federal RICO statute of limitations of four years to New Jersey RICO claims, *see Matter of Integrity Ins. Co.,* 584 A.2d 286 (1990), they insist that due to some recent changes to the way New Jersey courts approach state RICO claims, "it can no longer be predicted that the New Jersey Supreme Court would feel compelled to follow federal law in determining the appropriate statute of limitations for NJRICO." Thus, they argue that the law is unsettled with respect to how long the statute of limitations is for New Jersey RICO claims and suggest that the appropriate statute of limitations should be six years.[10]

---

[9] We, of course, do not suggest that in every case involving an IRS audit of some form, the claim will begin to run on the date of the audit. Nor do we suggest that assurances made by an investment's promoter or manager will never toll the statute of limitations. Rather, these types of questions are necessarily fact specific, based on the presence and exact type of storm warnings and the extent of inquiry undertaken with respect to due diligence. In this case, plaintiffs simply did not exercise enough diligence to either prevent the claim from accruing or to allow the statute of limitations to be tolled, as both "benefits" hinge on the exercise of reasonable diligence.

To support this claim, plaintiffs rely on *State v. Ball,* 661 A.2d 251 (N.J. 1995), in which, according to plaintiffs, the New Jersey Supreme Court declined to interpret NJRICO coextensively with federal interpretations of RICO, instead opting to interpret NJRICO as governed by state law principles. We disagree. A close reading of *Ball* suggests, contrary to plaintiffs' contention, that the New Jersey Supreme Court believed the New Jersey RICO statute was and should be consistent with the federal RICO statute. *Ball,* 661 A.2d at 258 ("[B]ecause the federal statute served as an initial model for [the NJRICO statute], we heed federal legislative history and case law in construing our statute."). Moreover, subsequent New Jersey cases belie plaintiffs' contention that the New Jersey RICO is somehow divergent from the federal RICO statute. *See, e.g., Interchange State Bank v. Veglia,* 668 A.2d 465, 472 (App. Div. 1995) ("There is no state decisional law on this aspect of civil RICO law. Therefore, parallel federal case law is an appropriate reference source to interpret the RICO statute."). In any event, nothing in *Ball*, or any other case, stands for the proposition that claims under the New Jersey RICO statute possess a six-year statute of limitations, as opposed to the commonly applied four-year limitations period for federal RICO claims. There is no evidence that the New Jersey RICO statute possesses a different statute of limitations from the federal RICO statute and we refuse to adopt such a rule. Thus, for the reasons above, and because plaintiffs were on notice of their claims, we will affirm the dismissal of the NJRICO claim on the ground of statute of limitations.[11]

---

[10] This is the general statute of limitations for New Jersey state law claims. *Mirra v. Holland Am. Line.* 751 A.2d 138, 140 (N.J. App. Div. 2002)

D. ERISA Claims

We turn next to plaintiffs' claim that the District Court erred when it dismissed the ERISA §§ 409 and 502(a)(2) claims for lack of standing. The District Court granted summary judgment for defendants on these two counts because it found that plaintiffs had only sought to recover damages in their individual capacities and failed to name their employer plans as plaintiffs. Because plaintiffs had not sued in a representative capacity they could not meet the standing requirements under either sections 409 or 502(a)(2). Plaintiffs present two arguments on appeal. However, we need not address them because irrespective of the vitality of their arguments, their ERISA §§ 409 and 502(a)(2) claims and their ERISA § 502(a)(3) claim are barred by the statute of limitations. *See Curay-Cramer v. Ursuline Acad. of Wilmington,* 450 F.3d 130, 133 (3d Cir. 2006) (citing *Bernitsky v. United States,* 620 F.2d 948, 950 (3d Cir. 1980)) (recognizing that "we can affirm on any basis appearing in the record"). ERISA § 413, 29 U.S.C. § 1113 provides that all claims based on breach of fiduciary duty must be brought within the earlier of:

---

[11] Our decision that the District Court was correct in applying the four-year statute of limitations to plaintiffs' New Jersey RICO claims is buttressed by the Supreme Court's analysis in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), which held that a universal four-year statute of limitations would apply in federal civil RICO actions. After deciding that a uniform federal statute of limitations was necessary, the Court adopted the Clayton Act's statute of limitation. The Court found that the Clayton Act provided the closest analogy to federal civil RICO claims because both statutes "were designed to remedy economic injury by providing for the recovery of treble damages, costs and attorney's fees. Both statutes also bring to bear the pressure of 'private attorneys' general' on a serious national problem for which public prosecutorial resources are deemed inadequate." 483 U.S. at 151. We anticipate the New Jersey Supreme Court will apply this analysis to New Jersey law and adopt the New Jersey Antitrust Act as the closest analogy to the New Jersey Racketeering Act, thus, the Antitrust Act's four-year statute of limitations would apply. *See Integrity Insurance*, 584 A.2d at 287.

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

By its terms then, ERISA's statute of limitations provision offers a choice of periods, depending on "whether the plaintiff has actual knowledge of the breach . . . ." *Kurz v. Phila. Elec. Co.,* 96 F.3d 1544, 1551 (3d Cir. 1996). In *Gluck v. Unisys Corp.*, we established that:

> Actual knowledge of a breach or violation requires that a plaintiff have actual knowledge of all material facts necessary to understand that some claim exists, which facts could include necessary opinions of experts, knowledge of a transactions's harmful consequences, or even actual harm.

960 F.2d 1168, 1178 (3d Cir. 1992) (internal citations omitted). We have thus stated that for purposes of determining actual knowledge, it must be shown that "plaintiffs actually knew not only of the events that occurred which constitute the breach or violation but also that those events supported a claim of breach of fiduciary duty or violation." *Montrose Med. Group Participating Savs. Plan v. Bulger*, 243 F.3d 773, 787 (3d Cir. 2001) (citations omitted). In other words, where a claim is for breach of fiduciary duty, to be charged with actual knowledge "requires knowledge of all relevant facts at least sufficient to give the plaintiff knowledge that a fiduciary duty has been breached or ERISA provision violated." *Gluck*, 960 F.2d at 1178.

Recognizing that the § 1113 statute of limitations sets a "high standard for barring claims against fiduciaries prior to the expiration of the six-year limitations" and the requirements must be interpreted "stringently," *Montrose*, 243 F.3d at 778, here, we nonetheless agree with the District Court that by 1995, plaintiffs had actual knowledge of the events and facts necessary to understand that a claim or violation existed. The core of plaintiffs' breach of fiduciary duty claim is that defendants made or ratified material misrepresentations to plaintiffs, or concealed material information from them, concerning the legitimacy of the VEBA plans. The record reveals the presence of IRS audits, examination reports, deficiency notices, Notice 95-34, and the possibility that plaintiffs would have to pay taxes, penalties, and interest on money they were told would be tax-free, in addition to their concerns that this information engendered. The totality of this information unequivocally demonstrates that plaintiffs were not only aware of all the material necessary to determine that defendants had in fact misrepresented the tax benefits of the VEBA plans, but also that defendants' representations were suspect.[12]

Plaintiffs' claim that their knowledge of a possible breach could not have arisen until the Tax Court invalidated the VEBA plans in 2001 is unpersuasive in light of both the clear import of the IRS's statements and warnings that the plans were in violation of the tax code and that any deductions stemming from investments in the VEBA plans would be disallowed, and the IRS' actions in disallowing, at that time, the contributions made to the VEBA plans. This information and corresponding official action stand in direct contradiction to the representations made by defendants and support a conclusion that, as a matter of law, plaintiffs were aware of the facts establishing a breach of fiduciary duty and thus in possession of actual knowledge necessary to understand that some claim exists. *See Romero v. Allstate Corp.*, 404 F.3d 212, 226 (3d Cir. 2005) ("In order to make out a breach of fiduciary duty claim . . . , a plaintiff must establish each of the following elements (1) the defendant's status as an ERISA fiduciary acting as a fiduciary; (2) a misrepresentation on the part of the defendant; (3) the materiality of that misrepresentation;

---

[12] We decline to treat Sankhla differently here again because, as noted earlier, despite the fact that he was never audited and never received a deficiency notice, he was subpoenaed in connection with his employer's audit in March 1995, and learned of and discussed the audits and their implications with his partners who had been targeted by the IRS, thereby placing him in possession of the same knowledge as the other plaintiffs.

and (4) detrimental reliance by the plaintiff on the misrepresentation.") (quoting *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 73 (3d Cir. 2001)); *see also Ranke v. Sanofi-Synthelabo Inc.*, 436 F.3d 197, 202–03 (3d Cir. 2006).

Moreover, the record establishes that after the IRS circulated Notice 95-34 and after it had audited and disallowed certain of plaintiffs' contributions, certain plaintiffs sought legal advice concerning the validity of the VEBA plans and the propriety of defendants' claims concerning the plan's validity. This establishes sufficient evidence that they were aware of the alleged breach and belying any claim to the contrary that they could not have known or understood that some claim existed.[13] *See Connell v. Trustess of the Pension Fund of the Ironworkers Dist. Council*, 118 F.3d 154, 158 (3d Cir. 1997) (recognizing that evidence of actual knowledge of an alleged breach can include the fact that plaintiffs sought expert advice). Consequently, we conclude that the evidence establishes that plaintiffs were in possession of the "material facts necessary to understand that some claim exists," *Gluck*, 960 F.2d at 1177, and, therefore, that they had actual knowledge of the alleged breach and are subject to the three year statute of limitations period for the ERISA claims. Accordingly, we will affirm the District Court's order dismissing plaintiffs' ERISA claims.

E. Plaintiffs' State Law Claims

Plaintiffs also object to the District Court's dismissal of their myriad state common law claims as time-barred.[14] Both parties agree that these claims are governed by New Jersey state law, which applies a six-year statute of limitations. N.J.S.A. § 2A:14-1; *Mirra v. Holland America Line,* 751 A.2d 138, 142 (N.J. App. Div. 2002); The District Court determined that plaintiffs' state law claims accrued in August 1995, when the IRS issued Notice 95-34 and some plaintiffs were audited. In making this determination, the District Court was bound to apply New Jersey's discovery rule, which begins the statute of limitations running when two conditions are met: (1) the plaintiff has suffered actual injury; (2) the plaintiff knows that the injury is due to the fault of another.[15] *Martinez v. Cooper Hosp./Univ. Med. Ctr.,* 747 A.2d 266, 272 (2000). This inquiry boils down to "whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured due to the fault of another," and requires an objective analysis. *Caravaggio v. D'Agostini,* 765 A.2d 182, 186–87 (N.J. 2001).

---

[13] Of course, as noted earlier, the legal advice they sought came from defendants' own attorney, Prupis, but this is irrelevant for a determination of whether plaintiffs had actual knowledge of the alleged breach.

---

[14] As noted earlier, plaintiffs state law fraud claims include fraud (Count XII), breach of fiduciary duty (Count XIV), breach of good faith and fair dealing (Count XVI), respondeat superior (Count XVII), conspiracy and aiding and abetting fraudulent misrepresentation (Count XVIII) and negligent misrepresentation (Count XIII).

[15] Generally, a cause of action accrues when a plaintiff has suffered an injury and is aware of a causal relationship between the injury and the actor. *See S. Cross Overseas Agency, Inc. v. Wah Kwong Shipping Group, Ltd.,* 181 F.3d 410, 425 (3d Cir. 1999). However, where "a party is reasonably unaware either that he has been injured, or that the injury is due to the fault or neglect of an identifiable individual or entity," the discovery rule will "postpone the accrual of a cause of action" until such time as a "reasonable person, exercising ordinary diligence, [would know or should have known] that he or she was injured due to the fault of another." *Caravaggio v. D'Agostini,* 765 A.2d 182, 186–87 (N.J. 2001). Here, it is agreed that because the plaintiffs' common law state claims sound in fraud, the discovery rule is applicable. *S. Cross,* 181 F.3d at 425 ("When the gist of the action is fraud concealed from the plaintiff, the statute begins to run on discovery of the wrong or of facts that reasonably should lead the plaintiff to inquire into the fraud.").

As we have discussed earlier, despite plaintiffs' assertions to the contrary, by August 1995 a reasonable person, exercising ordinary diligence, would have known both that they had been injured and that the injury was due to the fault of defendants. The presence of Notice 95-34 and its attendant consequences, combined with the audits and deficiency notices constitute sufficient harm to satisfy the first prong of the discovery test. *See Nappe v. Anscheleqitz, Barr, Ansell & Bonell,* 477 A.2d 1224 (N.J. 1984). And, additionally, despite the clear signs that plaintiffs had been harmed, they failed to make reasonable inquiries or investigations into the source of that harm, thus vitiating any claim that they could not establish some causation between their harm and another's fault. *See Apgard v. Lederle Labs.,* 588 A.2d 380, 383 (N.J. 1991); *see also Savage v. Old Bridge-Sayreville Med. Group, P.A.,* 633 A.2d 514 (N.J. 1993). We thus have no trouble agreeing with the District Court that, by August 1995, for purposes of plaintiffs' state law claims, the statute of limitations had begun to run.[16]

---

[16] Additionally, plaintiffs' insistence that the continuing tort doctrine renders the District Court's conclusion erroneous fails because, although the doctrine might apply where the plaintiff has no reason to believe he has been injured, it will not apply where the plaintiff "discovered or should have discovered the injury and its cause connection with the [negligence] before that time." *Lopez v. Sawyer,* 279 A.2d 116, 123 (N. J. App.Div. 1971). Here, plaintiffs should have discovered the cause of their injury in August 1995 because this is when facts became available that a reasonable person would have taken to suggest the possibility of wrongdoing. Additionally, neither the continuing tort doctrine nor the "last overt act" doctrine, which defendants also press, applies to fraud claims. No New Jersey courts have ever applied these doctrines to fraud claims

F. New Jersey Consumer Fraud Act

Plaintiffs next contend that the District Court erred by holding that the New Jersey Consumer Fraud Act (CFA) does not apply. Specifically, the District Court held that because the VEBA plans "were extremely complicated tax avoidance schemes involving tens, if not hundreds, of thousands of dollars[,]" to apply the Consumer Fraud Act would "stretch the admittedly broad application of the [ ] Act beyond the intent of the New Jersey legislature." Plaintiffs argue that the CFA must be applied broadly, and to the VEBA plans at issue here, as commanded by the New Jersey Supreme Court's holding in *Lemelledo v. Beneficial Management Corp.*, 696 A.2d 546, 550–51 (N.J. 1997). We are unpersuaded.

The CFA "is intended to protect consumers by eliminating sharp practices and dealings in the marketing of merchandise and real estate." *Id.* at 554 (internal quotations omitted); *see* N.J. Stat. Ann. § 56:8-1 *et seq.*[17] It is true that in *Lemelledo*, the New Jersey Supreme Court held the Act to apply to the sale of insurance policies to consumers. 696 A.2d at 555 ("[O]ur reading of the CFA

---

and we are unwilling, on these facts, to do so today. *Republic of Philippines v. Westinghouse Elec. Corp.*, 774 F. Supp 1438 (D.N.J. 1991).

[17] By its terms, the Act prohibits:

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been mislead, deceived or damaged thereby . . . .

N.J. Stat. Ann. § 56:8-2.

convinces us that the statute's language is ample enough to encompass the sale of insurance policies as goods and services that are marketed to consumers."). However, as New Jersey courts have repeatedly made clear, the CFA seeks to protect consumers who purchase "goods or services generally sold to the public at large." *Marascio v. Campanella,* 689 A.2d 859 (App.Div. 1997). Furthermore, "[t]he entire thrust of the Act is pointed to products and services sold to consumers in the popular sense." *Arc Networks, Inc. v. Gold Phone Card Co.,* 756 A.2d 636, 637 (N.J. Super. Ct. App. Div. 2000) (internal quotations omitted). Thus, the CFA "is not intended to cover every transaction that occurs in the marketplace[,]" but, rather, "[i]ts applicability is limited to consumer transactions which are defined both by the status of the parties and the nature of the transaction itself." *Id.*

These facts are insufficient to establish that the plans at issue, and the transactions by which they were sold, qualify as "products and services sold to consumers in the popular sense[,]" such that they fall within the ambit of the CFA. *Arc Networks,* 756 A.2d at 638. As opposed to the traditional sale of insurance policies, which are undoubtedly subject to the provisions of the CFA, *see Lemelledo,* 696 A.2d at 551, the VEBA plans at issue here are instead rather complex arrangements that do not reflect the kinds of "goods or services generally sold to the public." *Arc Networks,* 756 A.2d at 638. As the District Court found, the VEBA plans were complex tax-avoidance schemes designed primarily to allow an investor to make tax-deductible contributions while allowing for a permanent tax deferral upon withdrawal. Moreover, the plans were not available to the general public and were never marketed as such. Thus, the plans represent a highly specific scheme providing no real insurance products to plaintiffs, necessarily marketed to a discrete and specific class of capable investors—not the general public. Unlike the sale of credit to the general public or the "sale of insurance policies . . . that are marketed to consumers[,]" or even "anything offered[ ] directly or indirectly to the public for sale," *Lemelledo*, 696 A.2d at 551, the sale of complex employee welfare benefit plans to a very specific class of investor does not point to the remedial purpose or intent of the CFA, "namely, to root out consumer fraud." *Id.* Consequently, because "the entire thrust of the [CFA] is pointed to products and services sold to consumers in the popular sense[,]" *id.*, we cannot conclude that the District Court erred when it dismissed plaintiffs' claim under the CFA.[18]

IV. Conclusion

For the foregoing reasons, we will affirm the District Court's orders granting defendants' motions for summary judgment.

---

[18] Two issues remain. Penultimately, plaintiffs claim the District Court's erred by denying their claim to recover "benefit-of-the-bargain" damages for losses incurred as a result of the collapse of the VEBA plans. Because we affirm the District Court's dismissal of plaintiffs' substantive claims in all respects, including the dismissal of plaintiffs' state law claims, the issue as to whether plaintiffs could proceed under a benefit-of-the-bargain theory of recovery is moot. Lastly, on cross-appeal, defendants argue that plaintiffs' state law claims are preempted by ERISA. Because we have dismissed the state claims on other grounds, we need not reach and do not address this issue. *Nugent v. Ashcroft*, 367 F.3d 62, 168 (3d Cir. 2004).

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 00-5799 (AET)
ORDER

KAREN CETEL, *et al.*,
Plaintiffs,
—v.—
KIRWAN FINANCIAL GROUP, INC., *et al.*,
Defendants.

Civil No. 01-4781 (AET)
ORDER

VIJAY SANKHLA, *et al.*,
Plaintiffs,
—v.—
COMMONWEALTH LIFE INSURANCE COMPANY, *et al.*,
Defendants.

THOMPSON, U.S.D.J.

This matter is before the Court on the separate motions of certain Defendants for summary judgment pursuant to Fed. R. Civ. P. 56, and on the motion of Plaintiffs for reconsideration of this Court's March 2, 2004 Opinion and Order; and the Court, having reviewed the written submissions of the parties, and having heard oral argument on May 17, 2004, and for the reasons stated in an Opinion of this date, and for good cause shown,

It is on this 16th day of July, 2004,

ORDERED that Plaintiffs' motion for reconsideration of this Court's March 2, 2004 Opinion and Order [282] is DENIED; and it is further

ORDERED that the motion for summary judgment of Defendants Murphy, DSM Inc., and Pacific Executive Services [291] on Count I, and Counts VIII through XVIII of the Sankhla Complaint, 01-4781 (AET), is GRANTED; and it is further

ORDERED that the motion for summary judgment of Defendants Raymond Ankner, Beaven Companies, Inc., and CJA & Associates [288] as to Counts VIII through XVIII of Sankhla Complaint, 01-4781 (AET), is GRANTED; and it is further

ORDERED that the motion for summary judgment of Defendant Medical Society of New Jersey [289] as to Counts IX, XI, XII, XIII, and XVIII of the Sankhla Complaint, 01-4781 (AET), is GRANTED; and it is further

ORDERED that the motion for summary judgment of Defendants Commonwealth Life Insurance Company, Monumental Life Insurance, Peoples Security Life, Capital Holding Company, Providence Life Insurance, and AEGON USA, Inc. [284] on Count I, and Counts VIII through XVIII of the Sankhla Complaint, 01-4781 (AET), is GRANTED; and it is further

ORDERED that the motion for summary judgment of Defendant Barry Cohen [285] is GRANTED as to Counts VIII through X, and XII through XVIII of the Sankhla Complaint, 01-4781 (AET); and it is further,

ORDERED that summary judgment is granted in favor of Defendants on Count VI of the Cetel Complaint, 00-5799 (AET).

s/ Anne E. Thompson
ANNE E. THOMPSON U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 00-5799 (AET)
OPINION

KAREN CETEL, *et al.*,
Plaintiffs,
—v.—
KIRWAN FINANCIAL GROUP, INC., *et al.*,
Defendants.

Civil No. 01-4781 (AET)
OPINION

VIJAY SANKHLA, *et al.*,
Plaintiffs,
—v.—
COMMONWEALTH LIFE INSURANCE COMPANY, *et al.*,
Defendants.

THOMPSON, U.S.D.J.

This matter is before the Court on the separate motions of certain Defendants for summary judgment pursuant to Fed. R. Civ. P. 56, and on the motion of Plaintiffs for reconsideration of this Court's March 2, 2004 Opinion granting partial summary judgment to Defendants. The following Defendants have filed motions for summary judgment: "Monumental Defendants" (Commonwealth Life Insurance Company, Monumental Life Insurance, Peoples Security Life, Capital Holding Company, Providence Life Insurance, and AEGON USA, Inc.); "CJA Defendants" (Raymond G. Ankner, CJA Associates, and Beaven Companies, Inc.); "Murphy Defendants" (Donald Murphy, Pacific Executive Services, and DSM, Inc.); "Defendant Medical Society" (Medical Society of New Jersey); and "Defendant Cohen" (Barry Cohen). "Defendant Kirwan" (Michael Kirwan) has not filed any motions.

Plaintiffs Vijay Sankhla, M.D., Yale Shulman, M.D., Yale Shulman, M.D., P.A., Boris Pearlman, M.D., Denville Radiology, P.A., Karen Cetel, Marvin Cetel, M.D., Marvin Cetel, M.D., P.A., Morton Schneider, Barbara Schneider, M.D., and Barbara Schneider, M.D., P.A. (collectively referred to as "Plaintiffs") have filed a motion for this Court to reconsider its March 2, 2004 Opinion, in which the Court granted summary judgment to Defendants on most of Plaintiffs' federal claims.

This Court has reviewed the submissions of the parties and heard oral argument on May 17, 2004. For the reasons outlined below, Defendants' motions for summary judgment will be granted in part, and Plaintiffs' motion for reconsideration will be denied.

BACKGROUND

Plaintiffs, who are medical professionals, their spouses, and professional organizations allege that Defendants (insurance companies, insurance salespersons, financial services companies, and financial planners) are responsible for a fraudulent scheme to induce Plaintiffs to participate in a complicated insurance-based retirement benefit arrangement. The parties refer to this scheme as the voluntary employees' beneficiary association ("VEBA").

A VEBA is a tax-exempt program that provides life, sick, or accident insurance, or other benefits to its participants, their dependents, or designated beneficiaries "if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual." 26 U.S.C. § 501(c)(9). The general features of Defendants' VEBA plans are discussed in this Court's March 2, 2004 Opinion, the United States Tax Court's decision in *Neonatology Associates, P.A. v. Commissioner*, 115 T.C. 43, 49-57 (July 31, 2000) (hereinafter "*Neonatology I*"), and the United States Court of Appeals for the Third Circuit's Opinion in *Neonatology Associates, P.A. v. Commissioner*, 299 F.3d 221, 224-27 (3d Cir. 2002) (hereinafter "*Neonatology II*").

Plaintiffs began making financial contributions to Defendants' VEBA plans in the early 1990's. (Pl. SOF ¶¶ 206, 261, 314, 339; Sankhla Ver. ¶ 7.) Defendants Cohen and Kirwan, who were serving as the individual Plaintiffs' financial advisors, recommended that they participate. (Pl. SOF ¶¶ 204, 206, 210, 257, 260, 262, 303, 307, 333-39.) Plaintiffs allege that Defendants Cohen and Kirwan represented that if Plaintiffs participated in their VEBA plans, Plaintiffs would earn a significant tax deduction in the short term, and tax-free retirement income in the long term. (*See* Sankhla Compl't ¶¶ 3, 4.)

In 1995, the Internal Revenue Service ("IRS") began investigating whether the tax deductions Plaintiffs took for their VEBA contributions were allowed under the tax code. In June 1995, the IRS informed Plaintiffs Morton and Barbara Schneider that it was going to conduct audits of their personal income tax returns and the tax returns of Barbara Schneider's medical practice, Plaintiff Barbara Schneider, M.D., F.A.S.C., P.A. (Pl. SOF ¶ 213.) On June 21, 1995, the IRS issued the two examination reports, one for the Schneiders' personal taxes and one for Dr. Schneider's business. (Pl. Ex. 193, 194; Def. Ex. 107.) In those reports, the IRS listed in detail the amounts the IRS examiner determined the Schneiders owed in taxes due to their VEBA contributions. For tax years 1992 and 1993, the reports stated that the Schneiders owed $14,942.00 in personal taxes. (Pl. Ex. 193 at 2, 3; Def. Ex. 107 at 2, 3.) The report also included $2,988.40 in negligence-related penalties and $2,324.65 in interest. (*Id.*) With regard to its audits of Dr. Schneider's medical practice, the IRS determined that it owed $9,414.00 in taxes, $1,882.80 in negligence-related penalties, and $1,620.94 in interest. (Pl. Ex. 194 at 2, 4; Def. Ex. 107 at 10, 12.) Thus, as of June 21, 1995, the total tax liability the IRS determined the Schneiders owed because of their VEBA contributions was $33,172.79.

The examination notice to Dr. Schneider's medical practice also included a statement explaining why its VEBA contributions did not conform to IRS regulations and the tax code. (Pl. Ex. 194 at 6-8; Def. Ex. 107 at 14-16.) The notice concluded that

> [i]n summary, it is found that the owner-employee of the company created an investment plan fully insured. The taxpayer intends to terminate this plan at some future date. The taxpayer created a VEBA as a flow through vehicle and deducted the investments as business expenses. What normally would have non-deductible dividends have now been deducted as an insurance expense.

(Pl. Ex. 194 at 8, Def. Ex. 107 at 14.)

On June 1, 1995, the IRS informed Plaintiffs Marvin and Karen Cetel that it was going to audit their personal income tax returns and the tax returns of Dr. Cetel's medical practice, Plaintiff Marvin Cetel, M.D., P.A. (Pl. SOF ¶ 269; Def. Ex. 106 at 38-39.) On August 7, 1995, the IRS issued the two examination reports, one for the Cetels' personal taxes and one for Dr. Cetel's practice. (Pl. Ex. 192 at 2; Def. Ex. 106 at 2, 11.) In those reports, the IRS listed in detail the amounts the IRS examiner determined the Cetels owed due to their VEBA contributions. For tax years 1992 and 1993, the reports stated that the Cetels' personal tax liability was $10,106.00. (Def. Ex. 106 at 2, 4-5.) The report also included $2021.20 in negligence-related penalties and $1,813.06 in interest. (*Id.*) With regards to its audits of Dr. Cetel's medical practice, the IRS determined that it owed $11,612.00 in taxes, $2,322.40 in negligence-related penalties, and $2,238.59 in interest. (Pl. Ex. 192 at 2, 4-5; Def. Ex. 106 at 12, 14-15.) The examination report of Plaintiff Dr. Cetel's medical practice included the same explanation appended to Plaintiff Dr. Schneider's examination report which explained why the IRS was disallowing the VEBA deductions. (Pl. Ex. 192 at 6-8; Def. Ex. 106 at 16-18.) Thus, as of June 21, 1995, IRS considered the Cetels' VEBA-related tax liability to be $30,113.25.

On August 3, 1995, the IRS sent an examination report to Plaintiff Dr. Pearlman and his medical practice, Plaintiff Denville Radiology Associates. (Pl. Ex. 186; Def. Ex. 104.) In that report, the IRS listed in detail the amounts the IRS examiner determined that Plaintiff Denville Radiology owed as taxes due to its disallowed VEBA contributions. For tax year 1993, the IRS disallowed $42,029.00 in VEBA contributions, and as a result, Denville owed $8,410.00 in taxes, $1,682.00 in penalties, and $1,332.45 in interest. (Pl. Ex. 186 at 2, 4-5; Def. Ex. 104 at 2, 4-5.) This report, like the reports for Dr. Cetel's and Dr. Schneider's medical practices, included the IRS's explanation as to why it was disallowing the deductions for the VEBA contributions. (Pl. Ex. 186 at 6-8; Def. Ex. 104 at 6-8.)

Plaintiff Sankla began participating in Defendants' VEBA in 1994, after he became a partner in Lakewood Radiology, a professional medical corporation. (Pl. SOF ¶ 307-08; Sankhla Ver. ¶ 7.) Plaintiff Sankhla contributed to Lakewood Radiology's VEBA plan. (*See* Pl. Ex. 11, 65:20-66:8.) In 1995, the IRS audited Lakewood Radiology's tax returns. (Sankhla Ver. ¶ 7.) As a result of these audits, the IRS disallowed $986,826.00 in VEBA contributions for fiscal year 1991 and calendar years 1992 and 1993. *Neonatology II*, 299 F.3d at 226. Plaintiff Sankhla was not personally audited by the IRS. However, Plaintiff Sankhla states that he did learn that the IRS was auditing Lakewood Radiology's VEBA plan when his partners in that medical practice informed him "around mid-1995".[1] (Def. Ex. 49. Sankhla Dep. at 89:23 - 90:1.) Plaintiff Sankhla admits that when his partners told him of the IRS audits, "they were not able to fully explain the issues to [him] because they did not fully understand the issues themselves." (Sankhla Ver. ¶ 8.) Defendants contend that Plaintiff Sankhla became aware of the IRS's audit of Lakewood Radiology's VEBA plan in March 1995, when the IRS issued a summons for him to appear at an audit examination. (*See* Def. Monumental Supp. Cert., Ex. G.)

---

[1] The Court finds that "mid-1995" means the months of May, June, and July 1995.

By April 1995, Plaintiff Dr. Shulman learned that the IRS had begun auditing the contributions of other doctors who had joined the VEBA plans at issue here. (Def. Ex. 108 ¶ 108.) In "mid-1995" the IRS informed Plaintiff Dr. Shulman that it would be auditing his personal tax returns and the tax returns of his practice, Plaintiff Yale Shulman, M.D., P.A., for 1993, 1994, and 1995, with respect to their participation in the VEBA. (Def. Ex. 17 ¶ 10.) However, this audit did not begin until 1996. (Pl. SOF ¶ 395.)

The IRS also issued a notice in 1995 that addressed whether contributions to employee welfare benefit funds, such as the VEBAs at issue here, were deductible. *See* I.R.S. Notice 95-34, 1995 WL 300780 (June 5, 1995). Notice 95-34 made clear that "[i]n general, these arrangements do not satisfy the requirements for exemption under [the tax code]." *Id.* at 1. The notice also emphasized "that the Service has never issued a letter ruling approving the deductibility of contributions to a welfare benefit fund. . . ." *Id.* at 3. Most importantly, Notice 95-34 stated that "[t]axpayers and their representatives should be aware that the Service has disallowed deductions for contributions to these arrangements, and is asserting the positions discussed [in this notice] in litigation." *Id.*

In August 1995, Defendants Cohen and Kirwan sent a letter to Plaintiffs Dr. Cetel, Denville Radiology (Dr. Pearlman's medical practice), Dr. Shulman, and Dr.

Schneider informing them that the IRS had issued Notice 95-34. (Pl. SOF ¶¶ 218, 271, 344, 383; Pl. Ex. 148, 181; Def. Ex. 40, 42, 44.) The subject line of the letter was "IRS Notice 95-34 on Welfare Benefit Plans." (Pl. Ex. 148, 181; Def. Ex. 40, 42, 44.) Attached to this letter was a letter from Neil Prupis ("Prupis"), dated July 12, 1995, a lawyer retained by Defendants Cohen and Kirwan. (Pl. Ex. 40.) In that letter Prupis summarized and discussed the IRS's conclusion that contributions to certain VEBA plans were not tax deductible. (*Id.* at 1.) Prupis characterized Notice 95-34 as "an attempt by the Internal Revenue Service to discourage the proliferation of multiple employee welfare benefit plans." (*Id.* at 2.) Prupis went on to assert that this determination had not been "upheld by any Court" and that while there was litigation addressing this very issue, a final determination "may take two to four years." (*Id.*) Prupis stated that Plaintiffs' VEBA plans "*appear* to be structured in the proper manner and in compliance with all existing legal authority." (*Id.*) (emphasis added). Prupis also cautioned that "if the deductions are ultimately disallowed, then [VEBA participants] will be subject to tax with respect to the contributions." (*Id.* at 3.)

On the advice of Defendant Cohen, Plaintiffs Schneider, Cetel, and Pearlman retained Prupis to represent them against the IRS. (Pl. SOF ¶¶ 225, 273, 347.) Lakewood Radiology, of which Plaintiff Sankhla was a partner, also retained Prupis, (*see* Pl. SOF ¶ 318), but the record does not reflect whether this was at Defendant Cohen's recommendation. Plaintiffs also allege that Defendant Cohen urged them to continue to contribute to the VEBA plans, or risk losing any investment that they had made. (Pl. SOF ¶¶ 235, 277, 321, 354, 396.) Defendant Cohen and Prupis told Plaintiffs that the IRS was on a witch-hunt, and that Plaintiffs would ultimately prevail against the IRS in Tax Court. (Pl. SOF ¶¶ 234, 276, 318, 345, 398.) All of the Defendants relied on either the representations of Defendant Cohen or Prupis, or both, and continued to make contributions to their VEBA plans, (Pearlman Ver. ¶¶ 18, 24; Cetel Ver. ¶¶ 18-20, 25, 28; Sankhla Ver. ¶¶ 9-10; Shulman Ver. ¶¶ 13, 18, 24, 26-27; Schneider Ver. ¶¶, 17, 19, 23-24, 26, 29, 31), in spite of their knowledge that the IRS was questioning the deductibility of those contributions.

However, things did not turn out as Defendant Cohen and Prupis predicted. In *Neonatology I*, the Tax Court agreed with the IRS's assessment and found that the VEBAs at issue in this matter were frameworks that circumvented the intent and provisions of the Internal Revenue Code. 115 T.C. at 88-89. The *Neonatology* litigation initially involved 20 groups of physicians, including Plaintiffs, who, through their medical groups, had participated in Defendants' VEBA plans. Because all of the different parties shared the same basic facts as far as the jurisdiction of the Tax Court, two of these groups of physicians and their professional corporations were selected as a "test" case. *Neonatology I*, 115 T.C. at 44. Plaintiffs were not part of the "test" case, although Plaintiff Sankhla's employer group, Lakewood Radiology, was one of the "test" plaintiffs.

The Tax Court found that the plaintiffs' VEBA contributions were taxable disguised dividends and not deductible expenses. *Id.* at 91. The Third Circuit affirmed this decision. *Neonatology II*, 299 F.3d at 228. The courts found that these plans allowed the plaintiffs' corporations to pay inflated life insurance premiums so that the excess contributions would be available for redistribution to the individual shareholders free of income taxes. *Neonatology II*, 299 F.3d at 228; *Neonatology I*, 115 T.C. at 88-89. The decision of the Tax

Court was substantial for the *Neonatology* taxpayers and Plaintiffs because the professional medical corporations were denied deductions they had taken for their VEBA contributions and the individuals were charged with significant additional taxable dividend income. *See Neonatology II*, 299 F.3d at 223. The Third Circuit also upheld the Tax Court's finding that the individual taxpayers were liable for accuracy-related negligence penalties under I.R.C. § 6662(a). *Id.* at 233-35.

On July 20, 2000, Plaintiffs Schneider and Cetel filed a complaint against Prupis and his law firm, Defendant Kirwan, Defendant Cohen, Defendant Medical Society, CJA Defendants, and Monumental Defendants.[2] This Complaint (hereinafter referred to as the "Cetel Complaint") was removed to this Court on November 27, 2000. In the Cetel Complaint, Plaintiffs Schneider and Cetel allege that Defendants committed fraud (Counts I and II), fiduciary fraud/breach of fiduciary duty (Counts III and IV), breach of public policy (Count V), breach of contract (Count VI), breach of good faith and fair dealing (Count VII), negligence (Count VIII), and attorney malpractice (Count IX).

Plaintiff Sankhla filed his initial class action complaint on September 6, 2001. That Complaint was removed to this Court on October 12, 2001. On March 20, 2002, Plaintiff Sankhla filed an amended class action complaint (hereinafter referred to as the "Sankhla Complaint") adding Plaintiffs Shulman, Pearlman, Denville Radiology, the Cetels, and the Schneiders as named plaintiffs. This Complaint named Prupis and his law firm, Defendants Cohen, Kirwan, the Medical Society, the Murphy Defendants, Monumental Defendants, and the CJA Defendants,[3] and contained the following claims: ERISA (Counts I and II), federal RICO (Counts III through VI), conspiracy to violate federal RICO (Count VII), New Jersey's Racketeering Act (Count VIII); conspiracy to violate New Jersey's Racketeering Act (Count IX); New Jersey Consumer Fraud Act (Count X); unjust enrichment (Count XI); common law fraud (Count XII); negligent misrepresentation (Count XIII); breach of fiduciary duty (Count XIV); breach of contract (Count XV); breach of duty of good faith and fair dealing (Count XVI); respondeat superior (Count XVII); and conspiracy and aiding and abetting (Count XVIII). The class action allegations were voluntarily withdrawn by Plaintiffs. On November 25, 2002, the Cetel and Sankhla actions were consolidated pursuant to Fed. R. Civ. P. 42(a). Prupis and his firm settled with Plaintiffs and are no longer parties to this litigation.

---

[2] This Complaint originally included other defendants who are no longer parties to this litigation.

On July 8, 2002, this Court entered an Order dismissing Plaintiffs' state law claims as being preempted by ERISA. On March 2, 2004, the Court granted full summary judgment to Defendants on Plaintiffs' federal RICO claims and partial summary judgment to Defendants on Plaintiffs' ERISA claims. In its March 2, 2004 Opinion, this Court also reevaluated its July 8, 2002 decision to dismiss Plaintiffs' state law claims as preempted by ERISA. (3/2/04 Op. at 17.) The Court found that Plaintiffs' state law claims did "not require an examination of the particulars of the VEBA plans. Rather, these claims turn on Defendants' actions outside of the ERISA context; reference to the VEBA plans will only form a backdrop to this action." (*Id.* at 19.) The Court then reinstated Plaintiffs' state law claims, and allowed Defendants the opportunity to file motions for summary judgment as to those claims. (*Id.*) It is these motions that are the subject of this Opinion.

---

[3] This Complaint originally included other defendants who are no longer parties to this litigation.

The gravamen of Plaintiffs' Complaints is that Defendants induced Plaintiffs to participate in the VEBA plans by knowingly misrepresenting that the VEBA plans' tax benefits were legal and recognized by the IRS, various government agencies, and private entities. (Sankhla Compl't ¶¶ 13-16, 19, 24, 84, 135, 139-43, 151, 152; Cetel Compl't ¶¶ 1, 27, 32-35, Count I ¶¶ 7, 8, 9, 23, 32, Count II ¶¶ 7, 8, 23, 25, 36, Count V ¶¶ 1, 2, 5, 10, Count X ¶¶ 2, 3.) Specifically, Plaintiffs allege that

> [t]he Defendants knew that participants and/or prospective participants would not be likely to participate in the VEBA plan unless they believed that their contributions were fully tax-deductible and that they would be able to earn hundreds of thousands of dollars in tax-free retirement income through participation in the VEBA Plan. Therefore, these Defendants aggressively, and falsely, marketed the VEBA Plan by claiming that participants could make unlimited tax-deductible contributions to the VEBA Plan and that they would receive tax-free income out of the VEBA plan in the form of post-conversion "loans" from their individual insurance policies, with no adverse tax consequences to the principals of the company.

(Sankhla Compl't ¶ 139.) Plaintiffs also allege that Defendant Cohen told them that the IRS had approved their VEBA plans, and that this representation was crucial to their decisions to participate in the VEBAs. (Sankhla Compl't ¶¶ 84, 135e,152; Pl. SOF ¶¶ 211, 263, 308, 334, 336, 338, 364, 365; Sankhla Ver. ¶ 14; Schneider Ver. ¶ 10.) Plaintiffs contend that they relied heavily on the advice of Defendant Cohen because they did not understand the nuances of the VEBA. (Pl. SOF ¶¶ 210, 262, 308, 340, 366.)

DISCUSSION

A party seeking summary judgment must "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996). Summary judgment is to be granted against the non-moving party when that party has failed to make a sufficient showing, after discovery, establishing an element of her claim that is essential to her case, and on which the non-moving party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. In reviewing motions for summary judgment, the evidence is viewed in a light most favorable to the nonmovant. *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159-60 (3d Cir. 2003).

Defendants have moved for summary judgment on most of the claims contained in the Sankhla and Cetel Complaints, arguing that these claims are barred as a matter of law and that Plaintiffs filed them outside of the statute of limitaions. As discussed below, this Court will grant Defendants' motions for summary judgment on Plaintiffs' claims for breach of contract (Sankhla Compl't, Count XV; Cetel Compl't, Count VI), and unjust enrichment (Sankhla Compl't, Count XI) because Plaintiffs have failed to establish a genuine issue of material fact with regard to those claims. Defendants will be granted summary judgment on Plaintiffs' claims under New Jersey's Consumer Fraud Act (Sankhla Compl't, Count X) because the Court finds, as a matter of law, that Act does not apply to the VEBA plans at issue here. Summary judgment will be granted to the Murphy Defendants on the allegations contained in Plaintiffs' remaining ERISA claim for breach of fiduciary duty, (Sankhla Compl't, Count I), because Plaintiffs have not alleged facts sufficient to support some of those allegations and failed to make the remaining allegations within the statute of limitations. Lastly, the Court finds that the fraud-based counts contained in Plaintiff Sankhla's Complaint (Sankhla Compl't, Counts XII, XIV, XVI, XVIII) are barred by the statute of limitations.

I. *Breach of Contract*

Count XV of the Sankhla Complaint and Count VI of the Cetel Complaint allege that certain Defendants breached their contractual duties to Plaintiffs. The Sankhla Complaint includes Defendant Cohen, Defendant Kirwan, CJA Defendants, and Murphy Defendants, while the Cetel Complaint alleges that only Defendant Cohen, Defendant Kirwan, and CJA Defendants breached their contractual obligations.[4] Plaintiffs allege that they entered into contracts with Defendants in which Defendants guaranteed to provide Plaintiffs with tax deductions for their VEBA contributions and tax free income. (Cetel Compl't, Count VI ¶ 2; Sankhla Compl't ¶ 379.) Defendants argue that summary judgment is appropriate because Plaintiffs have not pointed to any contract or contractual provision Defendants allegedly violated or which contains such guarantees. (Def. Murphy Br. at 27; Def. Monumental Br. at 3; Def. CJA Br. at 4.)[5]

---

[4] These Counts originally included the Monumental Defendants. However, in their opposition brief, Plaintiffs withdrew their breach of contract and breach of fiduciary duty claims against the Monumental Defendants. (*See* Pl. Monumental Br. at 2.)

This Court agrees with Defendants that Plaintiffs have failed to proffer sufficient evidence that Defendants breached any contractual obligation. In their briefs and statement of facts, Plaintiffs have not pointed to any contractual provision or duty that obligated Defendants to provide the tax benefits. Plaintiffs' only arguments in support of their breach of contract claim are contained in Plaintiffs' brief in opposition to the Murphy Defendants. (Pl. Murphy Br. at 35.)

The sole evidence to which Plaintiffs cite is a statement by Defendant Murphy at his deposition that he had an obligation to "annually review the VEBA plan to ensure that it complied with all legal requirements." (Pl. Murphy Br. at 35.) Yet, this evidence does not show that the Murphy Defendants breached a contractual duty that guaranteed Plaintiffs tax benefits, which is the basis for their breach of contract claims. (*See* Cetel Compl't, Count VI ¶ 2-4; Sankhla Compl't ¶ 379-80.) This evidence is not even applicable to the Cetel Complaint because the Murphy Defendants are not named therein. Because Plaintiffs have not established that Defendants violated any contractual provision or duty that guaranteed tax benefits, the Court will grant Defendants' motions for summary judgment on Plaintiffs' claims for breach of contract.

---

[5] Defendant Cohen joined the arguments made by the other Defendants. (Def. Cohen Br. at 1.)

II. *Unjust Enrichment*

Count XI of the Sankla Complaint alleges that all of the Defendants, except the Medical Society,[6] were unjustly enriched at Plaintiffs' expense by their fraudulent misrepresentations as to the viability of the VEBA plans.[7] (Sankhla Compl't ¶¶ 366-68.) Unjust enrichment is a quasi-contractual remedy. *Shalita v. Township of Washington*, 636 A.2d 568, 571 (N.J. App. Div. 1994). To establish a claim for unjust enrichment a plaintiff must show that "it expected remuneration from a defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *VRG Corp. v. GKN Realty Corp.*, 641 A.2d 519, 526 (N.J. 1994).

There must be a direct relationship between a plaintiff and a defendant or a mistake on the part of the party conferring a benefit for quasi-contractual liability to accrue. *Callano v. Oakwood Park Homes Corp.*, 219 A.2d 332, 335 (N.J. App. Div. 1966). A party is precluded from recovering on a quasi-contractual basis if it has pleaded an express contractual obligation, absent a showing of rescission. *Moser v. Milner Hotels*, 78 A.2d 393, 394 (N.J. 1951) ("It is a well settled rule that an express contract excludes an implied one.") (citations and internal quotations omitted); *see also Callano*, 219

---

[6] Plaintiffs voluntarily withdrew their unjust enrichment claims against Defendant Medical Society. (Pl. Medical Society Br. at 2.)

[7] While Defendant Cohen has joined in the arguments of the other Defendants as to this Count, (*see* Def. Cohen Br. at 1), the Court declines to determine whether summary judgment in favor of Defendant Cohen is appropriate as to Plaintiffs' unjust enrichment claim. Such a determination would require an examination of the issues specific to his case and neither party has addressed those issues.

A.2d at 334 ("In the case of actual contracts the agreement defines the duty, while in the case of quasi-contracts the duty defines the contract.")

Relying on *Moser*, 78 A.2d at 394, the Murphy and Monumental Defendants contend that Plaintiffs' claim of unjust enrichment fails because Plaintiffs have pleaded express contractual relationships with them. (*See* Def. Monumental Br. at 13; Def. Murphy Br. at 23.) The CJA Defendants argue that summary judgment should be granted on Plaintiffs' unjust enrichment claim against it because Plaintiffs have failed to show any direct relationship with them or that Plaintiffs "expected remuneration" from them. (Def. CJA Reply Br. at 3.)

Plaintiffs' briefs are devoid of any arguments directed at the contentions of the Murphy Monumental Defendants. Plaintiffs' arguments are solely directed at the CJA Defendants. (*See* Pl. CJA Br. at 11-12; Pl. Monumental Br. at 1-2.) In its brief in opposition to the CJA Defendants' unjust enrichment arguments, Plaintiffs do not directly address CJA's contentions that there was no direct relationship or that Plaintiffs never expected remuneration from CJA. Instead, Plaintiffs argue that it would be improper to conclude, at the summary judgment phase, that "CJA deserves to retain the outlandish commissions it improperly received from the plaintiffs." (Pl. CJA Br. at 12.)

A party must proffer evidence that there was a direct relationship between it and the alleged defendant and either that the plaintiff expected remuneration from the defendant or that the defendant was "enriched beyond its contractual rights" to establish a claim for unjust enrichment. *See VRG Corp.*, 641 A.2d at 526; *Callano*, 219 A.2d at 335. With regard to the Murphy and Monumental Defendants, Plaintiffs point to no evidence that the Murphy and Monumental Defendants were enriched beyond the contractual rights that governed the parties' relationship. As to the CJA Defendants, Plaintiffs have not proffered any evidence that they had any direct relationship with CJA, that they expected remuneration from CJA during the time they participated in the VEBA, or that CJA was enriched beyond the contractual rights outlined in any agreement between Plaintiffs and CJA. As such, this Court finds that Plaintiffs have raised no genuine issue of material fact with regard to the CJA, Murphy, and Monumental Defendants' unjust enrichment arguments, and summary judgment will be granted in favor of those Defendants on this claim.

III. *New Jersey's Consumer Fraud Act*

Defendants have moved for summary judgment on Count X of the Sankhla Complaint, Plaintiffs' claims under New Jersey's Consumer Fraud Act ("Consumer Fraud Act"), N.J.S.A. 56:8-1 *et seq.* The Consumer Fraud Act provides, in pertinent part:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

N.J.S.A. 56:8-2. Under the Consumer Fraud Act, "merchandise" is defined as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c). A party that brings a successful claim under the Consumer Fraud Act is entitled to treble damages, attorney's fees, and costs. N.J.S.A. 56:8-19.

Plaintiffs contend that the VEBA plans and insurance products supporting those plans are "merchandise" within the meaning of the Consumer Fraud Act. Plaintiffs rely on *Lemello v. Beneficial Management Corp.*, 696 A.2d 546, 551 (N.J. 1997), in which the New Jersey Supreme Court found that "our reading of the [Consumer Fraud Act] convinces us that the statute's language is ample enough to encompass the sale of insurance policies as goods and services that are marketed to consumers." They allege that Defendants violated N.J.S.A. 56:8-2 by misrepresenting and concealing material facts as to whether the insurance-based VEBA plans were legitimate tax avoidance mechanisms to induce Plaintiffs to participate. (Sankhla Compl't ¶ 360.)

The Consumer Fraud Act was enacted to proscribe "unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate." *Daaleman v. Elizabethtown Gas Co.*, 390 A.2d 566, 568 (N.J. 1978). The Act's use of the word "consumer" is to be defined in accordance with the "ordinary meaning of that term in the marketplace." *J&R Ice Cream Corp v. California Smoothie Licensing Corp.*, 31 F.3d 1259, 1272-73 (3d Cir. 1994) (citing *Neveroski v. Blair*, 358 A.2d 473, 480 (N.J. App. Div. 1976)).

While the New Jersey Supreme Court has concluded that the sale of insurance policies falls underneath the Consumer Fraud Act, *Lemello*, 696 A.2d at 551, the VEBA plans at issue here cannot be said to be ordinary insurance policies bought by ordinary consumers. The facts of *Lemello* revolved around the practice of "loan packing" whereby a commercial lender increased the principal of a consumer loan by including loan-related services that the debtor did not ask for or want. *Id.* at 548. The amount of the loan in that case was just $2,000.00. *Id.* at 549.

This matter presents a entirely different factual scenario. The facts of this case do not present a situation analogous to the purchase of everyday auto, home, or consumer credit insurance. Instead, the VEBA plans at issue here were extremely complicated tax avoidance schemes involving tens, if not hundreds, of thousands of dollars. Plaintiffs Sankhla, Cetel, Schneider, Pearlman, and Shulman, all highly educated doctors running or participating in medical practices, admit that they did not fully understand the VEBA plan when they began participating in it. (Pl. SOF ¶¶ 210, 340, 366; Cetel Ver. ¶ 9, Sankla Ver. ¶ 12.) Plaintiff Dr. Schneider admits that she still does not understand the VEBA plan. (Pl. SOF ¶ 224.) To apply the Consumer Fraud Act to the facts of this case would stretch the admittedly broad application of the Consumer Fraud Act beyond the intent of the New Jersey Legislature. As such, the Court finds that as a matter of law, the Consumer Fraud Act is not applicable to this situation and Defendants will be granted summary judgment for Plaintiffs' claims under New Jersey's Consumer Fraud Act.

IV. *ERISA*

The Murphy Defendants have moved for summary judgment on what remains of Count I of the Sankhla Complaint, breach of fiduciary duty under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).[8] In this Court's March

---

[8] This Count originally included the Monumental Defendants, but Plaintiffs have voluntarily withdrawn their fiduciary claims against the Monumental Defendants. (*See* Pl. Monumental Br. at 2.)

2, 2004 Opinion and Order, it granted summary judgment in favor of Defendants on Count I as it related to § 409 and § 502(a)(2) of ERISA. The Murphy Defendants contend that summary judgment should be granted on Plaintiffs' § 502(a)(3) claim because Plaintiffs have not provided any evidence that establishes that the Murphy Defendants committed the breaches outlined in Plaintiffs' Complaint, or in the alternative, that Plaintiffs failed to file their ERISA claim within the three-year statute of limitations outlined in 29 U.S.C. § 1113(2).[9] (Def. Murphy Br. at 14-17.)

Plaintiffs allege that Murphy Defendants breached their fiduciary duty by making affirmative misrepresentations to Plaintiffs regarding the legality of the VEBA plans, concealing information, failing to establish trust accounts, receiving unreasonable compensation, and engaging in transactions adverse to the interests of the plan participants. (Sankhla Compl't ¶ 287.) Defendants contend that Plaintiffs have established no evidence that the Murphy Defendants breached their ERISA fiduciary duties in the manner alleged in the Complaint. (Def. Murphy Br. at 16-17.)

The Court agrees with the Murphy Defendants that Plaintiffs have failed to proffer sufficient evidence that the Murphy Defendants failed to establish trust accounts, received unreasonable or excessive compensation, engaged in transactions adverse to the interests of the beneficiaries, mishandled plan assets, failed to disclose and concealed plan documents, and failed to act in the interests of the Plaintiffs. (*See* Sankhla Compl't, Count I ¶ 287(c)-(h).) Thus, summary judgment will be granted to the Murphy Defendants on Count I as to those allegations.

---

[9] While Defendant Cohen has joined in the arguments of the Murphy Defendants as to this Count, (*see* Def. Cohen Br. at 1), the Court declines to determine whether summary judgment in favor of Defendant Cohen is appropriate as to Plaintiffs' remaining ERISA claim. Such a determination would require an examination of the issues specific to his case and neither party has addressed those issues.

However, there is a genuine issue of material fact as to whether the Murphy Defendants made or ratified material misrepresentations to Plaintiffs, or concealed material information from Plaintiffs. (*See* Sankhla Compl't, Count I ¶ 287(a), (b).) Thus, the Court must determine whether these specific allegations are barred by the three-year statute of limitations for fiduciary breach under ERISA.

Under ERISA, a plaintiff has three years from the date she has "actual knowledge" of the breach or violation of fiduciary duty to file her claim. 29 U.S.C. § 1113(2). A two-prong test is used to determine when a plaintiff possesses actual knowledge. *See Gluck v. Unisys Corp.*, 960 F.2d 1168, 1177 (3d Cir. 1992). Actual knowledge of a breach or violation requires not only a showing that the plaintiff actually knew of the events that occurred which constituted the fiduciary breach, but also that he was aware that those facts supported a cause of action under ERISA. *Richard B. Roush, Inc. Profit Sharing Plan v. New England Mut. Life Ins. Co.*, 311 F.3d 581, 585 (3d Cir. 2002). A plaintiff is aware of facts that support an ERISA action for fiduciary breach when she has "'actual knowledge' of harm inflicted or harmful consequences." *Id.* at 586. The Third Circuit mandates a stringent application of § 1113(2)'s actual knowledge requirement. *Id.* at 587.

The Court finds that Plaintiffs had actual knowledge of their remaining fiduciary breach allegations when they learned in 1995 that the IRS was going to disallow their VEBA contributions. The harmful consequences of the breach Plaintiffs allege were evident then: IRS audits and examination reports, Notice 95-34 and the attendant possibility that Plaintiffs would have to pay taxes, penalties and interest on money they allege the Murphy Defendants told them would be tax-free. Because the statute of limitations began to run in 1995 and Plaintiff Sankhla did not file his complaint alleging an ERISA fiduciary breach until 2001, the Court will grant summary judgment to Murphy Defendants on the remaining allegations of Count I of the Sankhla Complaint.

V. *Statute of Limitations*

Defendants have made a blanket argument that all of Plaintiffs' claims are barred by the statute of limitations. Because, as discussed above, the Court relies on other grounds to grant Defendants summary judgment on Plaintiffs' claims for breach of contract, unjust enrichment, New Jersey Consumer Fraud Act, and ERISA, the Court limits its statute of limitations discussion to Plaintiffs' fraud-based claims and their claim for negligent misrepresentation.

As discussed below, this Court finds that all of the remaining of counts of the Sankhla Complaint are time-barred. However, the Court also finds that because the claims asserted in the complaint of Plaintiffs Cetel and Schneider, filed on July 20, 2000, fall within the statute of limitations, Defendants' motions for summary judgment as to the remaining claims in that Complaint will be denied.

A. *Statute of Limitations under New Jersey's Racketeering Act, N.J.S.A. 2C:41-1 et seq.*

None of the parties dispute that the Sankhla Complaint's non-racketeering claims, Counts X through

XVIII, are governed by New Jersey's general six-year statute of limitations. *See* N.J.S.A. 2A:14-1. However, the parties do dispute the applicable statute of limitations as to Plaintiffs' Counts VIII and IX, alleged violations of the New Jersey Racketeering Act, N.J.S.A. N.J.S.A. 2C:41-2(c), (d). Defendants contend that New Jersey's Racketeering Act has a four-year statute of limitations. (Def. Murphy Br. at 5.) Plaintiffs counter that five years is appropriate. (Pl. Murphy Br. at 16.) The Court finds that a four-year statute of limitations is applicable.

The Racketeering Act itself does not include a statute of limitations and the Appellate Division and New Jersey Supreme Court have not addressed the issue. *See Smith v. Estate of Kelly*, 778 A.2d 1162, 1166 (N.J. App. Div. 2001) (recognizing that one New Jersey court has applied a four-year statute of limitations to state civil RICO actions, but declining to decide whether that is correct); *Fraser v. Bovino*, 721 A.2d 20, 25 (N.J. App. Div. 1998) (declining to decide whether New Jersey's Racketeering Act has a four or five-year statute of limitations). However, in *Liquidation of Integrity Insurance*, 584 A.2d 286, 287 (N.J. Law Div. 1990), the court applied a four-year statute of limitations to civil actions under New Jersey's Racketeering Act. The court found that because New Jersey's racketeering statute was modeled on federal RICO, 18 U.S.C. § 1961 *et seq.*, and federal courts were applying a four-year statute of limitations to federal civil RICO actions, New Jersey courts should apply a four-year statute of limitations to civil actions under New Jersey's Racketeering Act. *Integrity Insurance*, 584 A.2d at 287. The court buttressed its arguments on the fact that federal RICO "borrowed" its four-year statute of limitations from federal anti-trust laws, and New Jersey's Antitrust Act, N.J.S.A. 56:9-14, also has a four-year statute of limitations. *Id.*

Plaintiffs counter that in the absence of a statutory mandate, this Court should apply the N.J.S.A. 2C:1-6(g)'s general five-year statute of limitations for civil actions under New Jersey's Criminal Code. Plaintiffs cite to a number of New Jersey cases that limit the reliance on the federal RICO in interpreting the substantive aspects of New Jersey's Racketeering Act. *See e.g.*, *State v. Ball*, 661 A.2d 251 (N.J. 1995). However, Plaintiffs do not cite to any case that applies a five-year statute of limitations to New Jersey's Racketeering Act. *Integrity Insurance*, on the other hand, has been cited with approval by at least two federal courts. *See In re Bernheim Litigation*, 290 B.R. 249, 260 (D.N.J. 2003); *Companhia Sidergica Nacional v. D B Orban Co., Inc.*, 1991 WL 89645, at *6 (S.D.N.Y. May 23, 1991).

Moreover, while the New Jersey Supreme Court has limited its reliance on federal law in interpreting New Jersey's Racketeering Act, it has nonetheless reaffirmed that "because the federal statute served as an initial model for our own, we heed federal legislative history and case law in construing our statute." *Ball*, 661 A.2d at 258. In light of the fact that New Jersey's appellate courts have declined to address this issue, and the New Jersey Supreme Court has relied on federal law to aid in interpreting this statute, this Court will apply a four-year statute of limitations to New Jersey's Racketeering Act.

B. *Accrual of Plaintiffs' Claims*

In order to determine whether Plaintiffs' claims are barred by the statute of limitations, the Court must next determine when the claims accrued. Generally, a cause of action accrues, and a statute of limitations begins to run, at the time of the alleged injury. *See Caravaggio v.*

D'Agostini, 765 A.2d 182, 187 (N.J. 2001). In certain circumstances, however, New Jersey courts apply the "discovery rule" which delays the accrual of a cause of action until a plaintiff knows, or after the exercise of reasonable diligence, should know, that he has suffered an injury that was caused by the fault of another. *Mancuso v. Neckles ex rel. Neckles*, 747 A.2d 255, 256 (N.J. 2000) (citations omitted); *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd.*, 181 F.3d 410, 425 (3d Cir. 1999) (citing *Baird v. American Med. Optics*, 713 A.2d 1019, 1026 (N.J. 1998)). The discovery rule only modifies the general rule of accrual "to the extent of postponing the commencement of accrual of the cause of action until plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." *Lapka v. Porter Hayden Co.*, 745 A.2d 525, 530-31 (N.J. 2000) (quoting *Burd v. New Jersey Tel. Co.*, 386 A.2d 1310, 1314 (N.J. 1978)). Once a plaintiff learns or should have learned of facts that could lead to a potential cause of action, she has an "affirmative duty to use reasonable diligence to investigate [that] potential cause of action." *County of Morris v. Fauver*, 707 A.2d 958, 972 (N.J. 1998).

When determining whether the discovery rule applies, a court must ask whether the plaintiff filed her lawsuit within the statute of limitations beginning on the date she discovered, or by the exercise of reasonable diligence and intelligence should have discovered, the basis for her actionable claim. *Lapka*, 745 A.2d at 529. This standard boils down to "whether plaintiff 'knew or should have known' of sufficient facts to start the statute of limitations running." *Caravaggio*, 765 A.2d at 187 (citing *Baird*, 713 A.2d at 1028). This requires a court to determine two things: when a plaintiff became or reasonably should have become aware she was injured and when she became aware, or reasonably should have become aware that the injury was due to the fault of another. *Id.* (citing *Savage v. Old Bridge-Sayreville Med. Group*, 633 A.2d 514, 518 (N.J. 1993)).

C. *Plaintiffs' Fraud-Based Claims*

The Sankhla Complaint's Count VIII (New Jersey Racketeering), Count IX (New Jersey Racketeering conspiracy), Count XII (fraud), Count XIV (breach of fiduciary duty), Count XVI (breach of good faith and fair dealing), Count XVII (respondeat superior), and Count XVIII (conspiracy and aiding and abetting) are predicated on Plaintiffs' allegations that Defendants engaged in fraudulent conduct by intentionally misrepresenting that the IRS had approved the VEBA plans, and knowingly concealing and failing to disclose material information. (Sankhla Compl't ¶¶ 13-16, 19, 24, 84, 135, 139-43, 151, 152, 351, 352, 356, 366, 367, 376, 383, 386, 390, 391.) To state an action for fraud in New Jersey, a plaintiff must establish five elements: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1195 (N.J. 2000). Under New Jersey law, a claim for fraud accrues "on discovery of the wrong or of facts that reasonably should lead the plaintiff to inquire into the fraud." *Southern Cross*, 181 F.3d at 425.

It is clear that Plaintiffs were all aware of facts by the summer of 1995 that would have led a reasonable person to have an awareness that she may have been the victim of fraud. Plaintiffs allege that they began participating in Defendants' VEBA plans because Defendant Cohen represented that the IRS had approved the plans. (Pl. SOF ¶¶ 108-113, 211, 263, 308, 334, 336, 338, 364, 365; Cetel Ver. ¶ 11; Pearlman Ver. ¶ 10; Shulman Ver. ¶ 11; Schneider Ver. ¶ 10; Sankhla Ver. ¶ 14.) All of the Plaintiffs state that at the time they began participating in the VEBA plans, Defendant Cohen's representation that the VEBA plans had "IRS approval" meant

> that the IRS had studied the entire VEBA plan and had concluded that the representations being made [to them by Cohen], such as tax deductibility of contributions and the ability to withdraw retirement funds tax-free after conversion, were appropriate under the tax laws.

(Cetel Ver. ¶ 11; Pearlman Ver. ¶ 10; Shulman Ver. ¶ 11; Schneider Ver. ¶ 10; Sankhla Ver. ¶ 14.)

By August 1995, all of the Plaintiffs had either learned of IRS Notice 95-34 or had learned that the IRS had audited or was going to audit their personal or medical practices' tax returns as a result of their VEBA contributions. (*See* Pl. SOF ¶¶ 188, 213, 214, 218, 269, 271, 272, 317, 344, 345, 383; Def. Ex. 49, Sankhla Dep. at 89:23 - 90:1.) The Court concludes that if, as Plaintiffs allege, they relied upon Defendant Cohen's representation that the IRS had approved the VEBA plans at issue here, then any IRS action challenging the legality of their VEBA contributions would have alerted a reasonable person that Defendant Cohen may have lied to her about the IRS approval.

Yet, in spite of these clear signs that Defendant Cohen may have misrepresented the IRS's approval of the VEBA plans, Plaintiffs did not engage in reasonable inquiries into this alleged fraud. Instead, they all went to Defendant Cohen, the person who may have lied to them in the first place, to ask whether their money was safe and to ask him what to do.[10] (Pl. Murphy Br. at 25.) Plaintiffs make much of the fact that Defendant Cohen referred them to Prupis, a lawyer with a supposed expertise in tax matters, and that they relied on Prupis' representations that the IRS's interpretation of the tax was wrong. (*Id.*) Some of the Plaintiffs also went to their accountant, Alan Steinberg, who they admit "did not know anything about the VEBAs" and who just consulted with Prupis. (*Id.*)

The Court disagrees with Plaintiffs' assertion that in spite of the IRS examination reports, audits, and Notice 95-34, that Plaintiffs had no "reason to disbelieve their trusted advisors."[11] (Pl. Murphy Br. at 23.) Asking Defendant Cohen, who clearly had a substantial financial interest in the VEBA, whether the plans were legal does not constitute reasonable diligence. Retaining a lawyer recommended to you by the person who clearly may have lied to you is not reasonable diligence. Nor is going to an accountant who admits that he has no understanding of the plan and just relies on the representations of that lawyer. In addition, the Court finds that even if Plaintiffs believed Prupis' and Cohen's guarantee of a victory in the Tax Court, this does not negate the fact that Plaintiffs should have been aware that Defendant Cohen may have practiced fraud upon them when he initially represented that the IRS had approved the plans. This is especially true considering how Plaintiffs defined "IRS Approval." (*See* Cetel Ver. ¶ 11; Pearlman Ver. ¶ 10; Shulman Ver. ¶ 11; Schneider Ver. ¶ 10; Sankhla Ver. ¶ 14.)

---

[10] The Court notes that in the Third Circuit's *Neonatology II* decision the court questioned whether it would be reasonable for any person to rely on the "advice of a professional promoting a tax shelter for a fee." 299 F.3d at 234 n.22.

[11] While this Court does not address the issue of whether Defendant Cohen's representations as to the VEBA plans were believable when first made, it notes that "[w]hen a taxpayer is presented with what would appear to be a fabulous opportunity to avoid tax obligations, he should recognize that he proceeds at his own peril." *Neonatology II*, 299 F.3d at 234.

Plaintiffs next contend that the statute of limitations does not run on their fraud actions until they suffered actual damages. They reason that because IRS Notice 95-34 and the 1995 audits and examination reports did not impose any liability on Plaintiffs, they had no injury until the IRS issued deficiency notices requiring them to remit payment. (Pl. Murphy Br. at 24.)

Plaintiffs are incorrect that a claim based on fraud requires actual damages. Under New Jersey law, a fraud claim is actionable regardless of whether a plaintiff can show actual damages. *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1232-33 (N.J. 1984); *see also Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1168 n.7 (3d Cir. 1993). Because the intent of actions for fraud is to combat unfair dealing, as long as a plaintiff can establish that she relied on a defendant's intentional misrepresentation of a material fact, she is "entitled to vindicate [her] rights through an award of nominal damages and in appropriate cases to punish the defendant through an award of punitive damages." *Nappe*, 477 A.2d at 1232. Thus, the injury in a fraud action is not the resulting money damages, but is instead the fraud itself.

Plaintiffs also contend that while it might have been obvious that Defendant Cohen misrepresented material facts, and thus was "at fault," they had no way of knowing until later the roles the other Defendants played in the alleged fraudulent enterprise.[12] (Pl. Murphy Br. at 26.)

---

[12] However. Plaintiffs do admit that they knew the insurance company Defendants and the Medical Society were involved in the

Thus, Plaintiffs contend, the second prong of the discovery rule, "knowledge of fault" was not present in 1995. However, while knowledge of fault is required before a claim can accrue under the discovery rule, this factor requires awareness of facts

> that it is possible—not provable or even probable—that a third person's conduct that caused the injury was itself unreasonable or lacking in due care. Thus, knowledge of fault for purposes of the discovery rule has a circumscribed meaning: it requires only the awareness of facts that would alert a reasonable person exercising ordinary diligence that a third party's conduct may have caused or contributed to the cause of the injury and that conduct itself might possibly have been unreasonable or lacking in due care.

Savage v. Old Bridge-Sayreville Med. Group, 633 A.2d 514, 518 (N.J. 1993). Moreover, once a party knows, or reasonably should know that she has been injured, "it behooves [a party] to consult counsel promptly. It then becomes incumbent on counsel to investigate the matter, retain experts if required, and institute suit when the facts suggest a claim is well-founded. If counsel is uncertain about the identity of the culpable party, he or she may resort to the fictitious-name procedure in Rule 4:26-4." *Viviano v. CBS, Inc.*, 503 A.2d 296, 301 (N.J. 1986). Because Plaintiffs did not reasonably investigate their potential claims, they are precluded from arguing that they lacked knowledge of fault. *See County of Morris*, 707 A.2d at 972 ("[T]he discovery rule imposes on plaintiffs an affirmative duty to use reasonable diligence to investigate a potential cause of action, and thus bars

---

VEBA plans. (Schneider Ver. ¶ 8, 9; Shulman Ver. ¶ 9, 10; Sankhla Ver. ¶ 6, 13; Pearlman Ver. ¶¶ 8,9; Cetel Ver. ¶¶ 6,10.)

from recovery plaintiffs who had 'reason to know' of their injuries.").

Because Plaintiffs were aware of sufficient facts by August 1995 that would lead a reasonable person to diligently investigate their potential fraud-based claims, accrual will be set at August 1995. Plaintiffs Schneider and Cetel learned in June 1995 that the IRS was going to audit their VEBA contributions and received the Notice 95-34 letter from Defendant Cohen in August 1995. (Pl. SOF ¶¶ 213, 218, 269, 271; Pl. Ex. 193, 194; Def. Ex. 106 at 38-39, 107). In August 1995, Plaintiff Pearlman received an IRS examination report and Defendant Cohen's Notice 95-34 letter. (Pl. SOF ¶ 344; Pl. Ex. 186; Def. Ex. 104.) Plaintiff Shulman learned in April 1995 that the IRS was auditing other physicians' contributions to the VEBA plan in which he was participating, (Def. Ex. 108 ¶ 108), and the IRS informed him in "mid-1995" that it was going to audit his VEBA contributions, (Def. Ex. 17 ¶ 10). In August 1995, he received Defendant Cohen's Notice 95-34 letter. (Pl. SOF ¶ 383.) In "mid-1995" Plaintiff Sankhla learned that the IRS was auditing the VEBA plan to which he contributed as a partner at Lakewood Radiology. (Def. Ex. 49, Sankhla Dep. at 89:23-90:1.) There is also evidence that Plaintiff Sankhla may have learned of the IRS's audit of Lakewood Radiology in March 1995. (*See* Def. Monumental Supp. Cert., Ex. G.)

Because Plaintiffs' claims under the New Jersey Racketeering Act, (Sankhla Compl't, Counts VIII and IX), have a four-year statute of limitations the latest any of the Plaintiffs could have filed these claims was in 1999. Because the Sankhla Complaint was not filed until September 2001, these claims are barred.

The Sankhla Complaint's claims for fraud (Count XII), breach of fiduciary duty (Count XIV), breach of good faith and fair dealing (Count XVI), respondeat superior (Count XVII), conspiracy and aiding and abetting (Count XVIII) have a six-year statute of limitations. N.J.S.A. 2A:14-1. Because Plaintiffs did not file these claims until September, 2001, over six years after all of the Plaintiffs became aware of sufficient facts in support of their fraud-based claims, these claims are also barred by the statute of limitations.

D. *Negligent Misrepresentation*

Count XIII of the Sankhla Complaint alleges that Defendants negligently misrepresented that, among other things, the IRS had approved the VEBA plans. (Sankhla Compl't ¶ 37 1-72.) Applying the same accrual analysis as above, there is no question that Plaintiffs were aware at various points in the late spring and summer of 1995 of facts sufficient to lead a reasonable person to believe that Defendants had misrepresented material facts to induce them to participate in the VEBA. Because this claim has a six-year statute of limitations and Plaintiffs did not file this claim until September 2001, over six years after all of the Plaintiffs became aware of facts sufficient to support this claim, this claim is time-barred.

VI. *Plaintiffs' Motion for Reconsideration*

Plaintiffs have moved this Court to reconsider its March 2, 2004 Opinion and Order granting Defendants summary judgment on Plaintiffs' federal RICO claims and almost all of Plaintiffs' ERISA claims. Because the Court finds that Plaintiffs' motion does not allege manifest errors of law or fact, or present newly discovered evidence, *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999), this motion will be denied.

CONCLUSION

For the above reasons, the Court will grant the Medical Society, Murphy, Monumental, and CJA Defendants' motions for summary judgment; Defendant Cohen's motion for summary judgment will be granted in part; and Plaintiffs' motion for reconsideration will be denied. The accompanying Order will be entered.

July 16, 2004	/s/ Anne E. Thompson
DATE	ANNE E. THOMPSON, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 00-5799 (AET)
OPINION

KAREN CETEL, *et al.*,
Plaintiffs,
—v.—
KIRWAN FINANCIAL GROUP, INC., *et al.*,
Defendants.

THOMPSON, U.S.D.J.

This matter is before the Court on the separate motions of certain Defendants for summary judgment pursuant to Fed. R. Civ. P. 56, and on the motions of Plaintiffs and certain Defendants to apply the doctrine of collateral estoppel; and the Court, having reviewed the written submissions of the parties, and having heard oral argument on February 23, 2004, and for the reasons stated in an Opinion of this date, and for good cause shown,

It is on this 2nd day of March, 2004,

ORDERED that Plaintiffs' motion for partial summary judgment on the issue of collateral estoppel [220] is DENIED; and it is further

ORDERED that the cross-motion of Defendants Murphy, DSM Inc., and Pacific Executive Services for summary judgment on the issue of collateral estoppel [250] is DENIED; and it is further

ORDERED that Defendant Medical Society of New Jersey's cross-motion for summary judgment on the issue of collateral estoppel [245] is DENIED; and it is further

ORDERED that the motion for summary judgment of Defendants Raymond Ankner, Beaven Companies, Inc., and CJA & Associates as to Counts III through VII of Plaintiffs' complaint [217] is GRANTED; and it is further

ORDERED that the motion for summary judgment of Defendants Murphy, DSM Inc., and Pacific Executive Services [218] on Count I, as it relates to § 409 and § 502(a)(2) of ERISA, and Counts II through VII of Plaintiffs' complaint is GRANTED; and it is further

ORDERED that the motion for summary judgment of Defendant Medical Society of New Jersey [227] is GRANTED; and it is further

ORDERED that the motion for summary judgment of Defendants Commonwealth Life Insurance Company, Monumental Life Insurance, Peoples Security Life, Capital Holding Company, Providence Life Insurance, and AEGON USA, Inc. [234] as to Count I, as it relates to § 409 and § 502(a)(2) of ERISA, and Counts III through VII of Plaintiffs' complaint is GRANTED; and it is further

ORDERED that Defendant AEGON USA Inc.'s motion for summary judgment [234] as to all Plaintiffs' claims is DENIED; and it is further

ORDERED that summary judgment on Plaintiffs' "benefit of the bargain" damages is GRANTED to all Defendants; and it is further

ORDERED that the cross-motions of Defendants Commonwealth Life Insurance Company, Monumental Life Insurance, Peoples Security Life, Capital Holding Company, Providence Life Insurance, and AEGON USA, Inc [236]; Defendants Murphy, DSM Inc., and Pacific Executive Services [233]; and Defendants Raymond Ankner, Beaven Companies, Inc., and CJA and Associates [261] are DENIED; and it is further

ORDERED that Plaintiffs' cross-motion to strike a portion of the certification of Paula Jackson [265] is DENIED; and it is further

ORDERED that the summary judgment motion originally filed by Defendants Commonwealth Life Insurance Company, Monumental Life Insurance, Peoples Security Life, Capital Holding Company, Providence Life Insurance, and AEGON USA, Inc. [224] is MOOT; and it is further;

ORDERED that Plaintiffs' state law claims dismissed by this Court are REINSTATED; and it is further

ORDERED that summary judgment motions as to Plaintiffs' state law claims are to be filed no later than March 24, 2004, and will be returnable on April 19, 2004.

s/ Anne E. Thompson
ANNE E. THOMPSON U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 00-5799 (AET)

OPINION

KAREN CETEL, *et. al.*,
Plaintiffs,

—v.—

KIRWAN FINANCIAL GROUP, INC., *et. al.*,
Defendants.

THOMPSON, U.S.D.J.

This matter is before the Court on the separate motions of certain Defendants for summary judgment pursuant to Fed. R. Civ. P. 56, and on the motions of Plaintiffs and certain Defendants to apply the doctrine of collateral estoppel. The following Defendants have filed motions for summary judgment: "Monumental Defendants" (Commonwealth Life Insurance Company, Monumental Life Insurance, Peoples Security Life, Capital Holding Company, Providence Life Insurance, and AEGON USA, Inc.); "CJA Defendants" (Raymond G. Ankner, CJA Associates, and Beaven Companies, Inc);

"Murphy Defendants" (Donald Murphy, Pacific Executive Services, and DSM, Inc); and Defendant Medical Society of New Jersey. Plaintiffs Vijay Sankhla, M.D., Yale Shulman, M.D., Yale Shulman, M.D. P.A., Boris Pearlman, M.D., Denville Radiology, P.A., Marvin Cetel, M.D., Marvin Cetel, M.D. P.A., Barbara Schneider, M.D., and Barbara Schneider, M.D. P.A. (collectively referred to as "Plaintiffs"), the Murphy Defendants, and Defendant Medical Society have filed motions for collateral estoppel.

This Court has reviewed the voluminous submissions of the parties and heard oral argument on February 23, 2004. For the reasons outlined below, Defendants' motions for summary judgment will be granted, the motions for collateral estoppel will be denied, and the Court will reinstate Plaintiffs' state law claims.

BACKGROUND

Plaintiffs, physicians and their professional corporations, assert that Defendants (insurance companies, insurance salespersons, financial services companies, and financial planners) misrepresented to them the potential tax benefits of voluntary employee beneficiary associations ("VEBAs") in order to induce them to fund pre-retirement and post-retirement death benefits for their employees through the purchase of life insurance. A VEBA, as defined in I.R.C. § 501(c)(9), is a tax-exempt program providing members, their dependents, or designated beneficiaries with life, sick, accident, or other benefits "if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual."

In short, Plaintiffs allege that Defendants marketed the VEBAs as creating a tax deduction for the employer's contributions to an employee welfare benefit plan and a permanent tax deferral for the employees. Under the VEBA plans, the employer (Plaintiffs' professional corporations) would purchase, and deliberately overpay for, group life insurance for its employees (the Plaintiff-physicians). The annual contributions used to purchase the policies were supposed to be tax deductible, and the employees, by later converting the group life insurance policies to individual policies, were supposed to realize any premium overpayments as tax conversion credits. Thus, Plaintiffs would realize two tax benefits under Defendants' VEBA plans: (1) their professional corporations would be able to deduct the life insurance premium payments, and (2) when the individual Plaintiffs, as employees of their professional corporations, converted the group life insurance polices to individual policies, they would realize the insurance overpayments as conversion credits.

Plaintiffs allege that in or about 1990, the Murphy Defendants and CJA Defendants conceived of the VEBA plans to take advantage of the Tax Reform Act of 1986. Defendant Michael Kirwan and his company, Defendant Kirwan Financial Group ("Kirwan Defendants"), and one of Kirwan Financial's longtime insurance salesmen and financial advisors, Defendant Barry Cohen, were enlisted by CJA and the Murphy Defendants to assist them in marketing the VEBA plans to medical professionals, such as Plaintiffs. Plaintiffs began participating in Defendants' VEBA plans around 1990.

The insurance policies which formed the backbone of the VEBA plans were originally provided by non-party Inter-American Insurance Company. Plaintiffs allege that in 1991, Monumental Defendants entered into an agreement with the Murphy and CJA Defendants to market Monumental's insurance products to fund the VEBAs.

Defendant Medical Society of New Jersey is a professional organization of physicians in New Jersey. It is involved in this case because it endorsed VEBA plans to its physician members from 1990-1995. In exchange for its endorsement, the Medical Society received royalties generated by the sale of VEBA plans to its members. Coincidently, Plaintiff Yale Shulman was on the Medical Society's Committee on Membership Services which approved the Society's endorsement of VEBAs at issue in this matter.

The Internal Revenue Service (IRS), however, had a somewhat different view of the legality of the VEBA plans. On June 5, 1995, the IRS issued Notice 95-34 which announced that the IRS did not consider the VEBAs' tax avoidance mechanism to be in compliance with the tax code. In that notice, the IRS informed the public that it had disallowed such deductions and was asserting its position in litigation. In 1994 and 1995, the IRS issued deficiency notices to all of the Plaintiffs or their VEBA plans. Subsequent to these notices, the IRS conducted audits of the Lakewood Plan (Plaintiff Sankhla's plan) and the other individual Plaintiffs. The IRS determined that Plaintiffs' VEBA plans contravened the tax code and assessed deficiencies and penalties.

In *Neonatology Associates, P.A. et al v. Comm'r of Internal Revenue*, 115 T.C. 43 (2000), *aff'd* 299 F.3d 221, 234 (3d Cir. 2002), the Tax Court agreed with the IRS's assessment of the VEBA plans and found that the VEBAs at issue in this matter were frameworks that circumvented the intent and provisions of the Internal Revenue Code.[1] Essentially, these plans allowed Plaintiffs' corporations to pay inflated life insurance premiums so that the excess contributions would be available for redistribution to the individual shareholders free of income taxes. The decision of the Tax Court was substantial for the petitioners because their professional medical corporations were denied deductions they had taken for the contributions and the individuals were charged with significant additional taxable dividend income. The court held further that the individual taxpayers were liable for accuracy-related negligence penalties under I.R.C. § 6662(a).

---

[1] The *Neonatology* litigation initially involved 20 groups of physicians, including Plaintiffs, who, through their medical groups, had participated in Defendants' VEBA plans. Because all of the different parties shared the basically the same facts as far as the juris-

Plaintiffs' complaint alleges violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, and various state law claims. This matter comprises two consolidated cases: *Cetel, et al. v. Kirwan Financial, et al.*, Civ. No. 00-5799 (AET), and *Sankhla v. Commonwealth Life, et al.*, Civ. No. 01-4781 (AET). The Cetel action was filed on July 20, 2000 and Sankhla was filed on September 6, 2001. On July 8, 2002, this Court entered an Order dismissing Plaintiffs' state law claims as being preempted by ERISA. The two cases were consolidated on November 25, 2002. On January 9, 2004, as per the scheduling order, parties submitted summary judgment motions.

DISCUSSION

A party seeking summary judgment must "show that there is no genuine issue as to any material fact and the

---

diction of the Tax Court, two of these groups of physicians and their professional corporations were selected as a "test" case. *Neonatology*, 115 T.C. at 44. Plaintiffs were not part of the "test" case, although Plaintiff Sankhla's employer group, Lakewood Radiology, was one of the "test" petitioners.

moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996). Summary judgment is to be granted against the non-moving party when that party has failed to make a sufficient showing, after discovery, establishing an element of her claim that is essential to her case, and on which the non-moving party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. In reviewing motions for summary judgment, the evidence is viewed in a light most favorable to the nonmovant. *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159-60 (3d Cir. 2003).

1. *RICO Statute of Limitations and Accrual*

All Defendants who filed summary judgment motions contend that they are entitled to summary judgment on all of Plaintiffs' RICO claims, because those claims are time-barred.[2] Under RICO, it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). While RICO is a criminal statute, 18 U.S.C. § 1964(c) provides that private parties may bring civil actions under its provisions. The general purpose of civil RICO actions is "to encourage plaintiffs to actively investigate potential criminal activity, 'to become prosecutors, private attorneys general' dedicated to eliminating racketeering activity." *Mathews v. Kidder Peabody & Co., Inc.*, 260 F.3d 239, 252 (3d Cir. 2001) (quoting *Rotella v. Wood*, 528 U.S. 549, 557 (2000)).

---

[2] Plaintiffs contend that the CJA Defendants waived any statute of limitations argument by not raising it in their complaint. *See* Fed. R. Civ. P. 8(c) (all affirmative defenses must be pled). CJA Defendants argue that the Third Circuit applies such waivers "leniently" where there is no prejudice. *See Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1373 (3d Cir. 1993). CJA claims there is no prejudice here because several of its co-defendants (and alleged co-conspirators) have asserted that defense, and discovery in this case did not begin in earnest until the fall of 2003. Because there is no prejudice to Plaintiffs in permitting CJA Defendants to raise a statute of limitations defense at this point in the litigation, this Court declines to find that the CJA Defendants have waived that defense.

Plaintiffs filed amended their complaint, adding claims for RICO violations, on March 20, 2002. Counts III through VII allege violations of RICO. Count III through Count V of Plaintiffs' complaint allege that Defendants violated 18 U.S.C. § 1962(c), "by embezzling, stealing, or unlawfully and willfully converting to their own use the assets of any employee welfare benefit plan in violation of 18 U.S.C. § 664, and formulating a scheme or artifice to defraud Plaintiffs . . . and used the U.S. mails and interstate wires in furtherance of that scheme, in violation of 18 U.S.C. §§ 1341 [mails] and 1343 [interstate wires]." (Compl't ¶¶ 303, 304, 313, 314, 324, 325.) Plaintiffs claim in Count VI that Defendants violated 18 U.S.C. § 1962(c) by conducting their racketeering affairs as an "association-in-fact" enterprise. (*Id.* ¶ 332.) Count VII claims that Defendants conspired to violate RICO in violation of 18 U.S.C. § 1962(d). (*Id.* ¶ 339.) Plaintiffs contend that the "pattern of racketeering activity engaged in by Defendants began in or about 1990 and has continued to this date." (*Id.* ¶¶ 306, 316, 325, 334.)

A. *RICO Statute of Limitations and Inquiry Notice*

While RICO does not include a limitations period for civil claims, the Supreme Court has held that the four-year limitations period in civil antitrust actions seeking treble damages under the Clayton Act is applicable to RICO actions. *Forbes v. Eagleson*, 228 F.3d 471, 483 (3d Cir. 2000) (citing *Agency Holding Corp. v. Malley-Duff Assocs.*, 483 U.S. 143, 156 (1987)). The Third Circuit has adopted an "injury discovery rule" whereby a RICO claim accrues (and thus the four-year statute of limitations begins to run) when "plaintiffs knew or should have known of their injury." *Mathews*, 260 F.3d at 250. The second part of the injury discovery rule requires a court to determine when a party "should have known" or was on "inquiry notice" of his injury. *Id.* at 251.

A plaintiff is deemed to be on "inquiry notice" of his RICO claims "whenever circumstances exist that would lead a reasonable investor of ordinary intelligence, through the exercise of reasonable due diligence, to discover his or her injury." *Id.* The Third Circuit has characterized such circumstances as "storm warnings." *Id.* at 251 & n.15 (citing *Great Rivers Coop. of Southeastern Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 896 (8th Cir.1997) ("[I]nquiry notice exists when there are 'storm warnings' that would alert a reasonable person of the possibility of misleading information, relayed either by an act or by omission.")). In other words, "if a prudent person would have become suspicious from the knowledge obtained through the initial prudent inquiry and would have investigated further, a plaintiff will be deemed to have knowledge of facts which would have been disclosed in a more extensive investigation." *Id.* at 251 n.15 (quoting *Gray v. First Winthrop Corp.*, 82 F.3d 877, 881 (9th Cir.1996)).

There is a two-part test to determine whether a plaintiff should be deemed to be on "inquiry notice" of RICO violations: (1) the defendant must establish the existence of sufficient storm warnings that would alert a reasonable person of potentially misleading information; and (2) if the defendant shows the existence of such warnings, the burden shifts to the plaintiff to show that he "exercised reasonable due diligence and yet was unable to discover his injuries." *Mathews*, 260 F.3d at 251-52. The Third Circuit has rejected the suggestion that summary judgment is improper when the issue of injury discovery is contested by the parties. *Id.* at 250 n.13. "If the facts needed in order to determine when a reasonable investor of ordinary intelligence discovered or should have discovered the fraud can be gleaned from the pleadings, a court may resolve the issue of the existence of fraud at the summary judgment phase." *Id.*

1. *First Prong of Inquiry Notice*

Defendants contend that a number of actions in 1995 put the Plaintiffs on inquiry notice of their RICO claims, and thus under RICO's four-year statute of limitations Plaintiffs had until 1999 to file their RICO claims. The first action occurred with the publication of IRS Notice 9534 on June 5, 1995. This notice addressed whether contributions to employer welfare benefit funds, such as the VEBAs at issue here, were deductible. The notice made clear that "[i]n general, these arrangements do not satisfy the requirements for exemption under [the tax code]." (Murphy Def. Ex. 39, I.R.S. Notice 95-34.) The notice also emphasized "that the Service has never issued a letter ruling approving the deductibility of contributions to a welfare benefit fund. . . ." Most importantly, Notice 95-34 stated that *"[t]axpayers and their representatives should be aware that the Service has disallowed deductions for contributions to these arrangements, and is asserting the positions discussed [in this notice] in litigation."* (emphasis added).

In addition to Notice 95-34, the IRS issued deficiency notices and conducted audits in relation to Plaintiffs' VEBA plans. These audits related to the deductibility of VEBA contributions. The Lakewood Radiology Plan (Plaintiff Sankhla's plan), and Plaintiffs Schneider, Pearlman, and Cetel received tax deficiency notices in August 1995. Plaintiff Shulman received a deficiency notice in 1994. On the advice of Defendant Cohen, the financial advisor who sold them the VEBA plans, Plaintiffs individually retained attorney Neil Prupis, a former defendant in this case, to represent them in relation to the audits. In addition, upon learning of Notice 95-34 and the IRS audits, the Medical Society of New Jersey, Plaintiffs' professional organization, stopped endorsing Defendants' VEBA plans.

The Court finds that IRS Notice 95-34 and the IRS audits of Plaintiffs in connection with that notice were sufficient storm warnings of potential problems with the VEBA plans and of the facts underlying Plaintiffs' RICO claims. Notice 95-34 was a warning from the IRS that it did not consider such tax benefits to be legal under the tax code. The notice also stated that the IRS had disallowed such deductions and was pursuing its position in litigation. It also strains credulity for Plaintiffs to reason that the 1995 IRS audits of the very plans at issue here, after an IRS Notice calling into question the legality of such plans and informing participants of ongoing litigation, were not "Category V (extreme)" hurricane warnings.

Moreover, Plaintiffs' RICO claims center on the allegation that Defendants engaged in a scheme to willfully misrepresent the tax consequences of the VEBA plans to induce Plaintiffs to participate. If the primary purpose of the VEBA plans was tax savings, and Defendants had represented from the beginning that the tax benefits were legal, then any challenge to that assertion by the IRS should have set off alarms. Thus, in 1995, there is no question that sufficient "storm warnings" existed to put Plaintiffs on notice that the tax benefits which formed the basis of the VEBAs rested on extremely dubious legal grounds, and that Defendants may have misrepresented the legality of those plans.

2. *Second Prong of Inquiry Notice*

The second prong of the "inquiry notice" analysis requires a plaintiff to show that she exercised "reasonable due diligence" and yet was unable to discover her injuries. *Mathews*, 260 F.3d at 252. The second prong comports with the general purpose of civil RICO actions "to encourage plaintiffs to actively investigate potential criminal activity, 'to become prosecutors, private attorneys general' dedicated to eliminating racketeering activity." *Id.* (quoting *Rotella*, 528 U.S. at 557). A plaintiff must first show that he investigated the suspicious circumstances; then the court must determine whether those efforts were adequate—"i.e. whether they exercised the due diligence expected of reasonable investors of ordinary intelligence." *Id.* Unsophisticated persons will not be held to a lower standard of diligence. *Id.* (quoting *Rotella*, 528 U.S. at 557). If storm warnings exist and a plaintiff refuses to investigate them, a court is to find that plaintiff on inquiry notice of his claims. *Id.* at 252 n.16.

Plaintiffs essentially contend that they were relieved of their duty to investigate because Defendant Cohen and Prupis "insisted that the IRS was on a 'witch-hunt' ", and that Defendants "encouraged Plaintiffs to challenge the IRS and continue to participate in the VEBA plan." (Pl. CJA Brief at 10.) Plaintiffs conclude that "[b]ased on Defendants' ongoing representations, Plaintiffs had every expectation that they would receive the benefits promised to them by Defendants and that the IRS would lose the Tax Court case." (*Id.*) Plaintiffs also make the assertion that so long as "legal remedies" existed that would exonerate the VEBA plans, any RICO injury would have been "speculative" at that point. (*Id.*) In addition, at oral argument, Plaintiffs' counsel went to great lengths to argue that Plaintiffs' lack of awareness of their RICO injuries is evidenced by the fact that Plaintiffs continued to participate in the VEBA plans after the IRS notices and audits.

This part of the "inquiry notice" analysis requires a plaintiff to establish that she exercised "reasonable due diligence" in light of the storm warnings. In *Forbes*, the plaintiffs hired an investigator who made numerous inquiries and requested financial documents not only from the defendant but from related parties. 228 F.3d at 479. In contrast, Plaintiffs have not alleged that they engaged in any due diligence beyond seeking the advice of Defendant Cohen, their financial advisor, and Neil Prupis, a lawyer to whom Cohen referred Plaintiffs.

It seems incredible for sophisticated, educated physicians and businesspeople to argue that they relied solely on Defendants' assurances of a "victory" over the IRS in the Tax Court. Moreover, it is very clear that Defendants had their own self-interest in the continued viability of the VEBA plans. Defendants were heavily involved in such plans and had strongly represented the VEBAs as legitimate tax avoidance methods. The second part of the inquiry notice test puts the burden squarely upon the shoulders of Plaintiffs to investigate any potential problems. Asking Defendants whether the plans were legal does not constitute reasonable due diligence. In addition, the fact that Plaintiffs continued to contribute to the VEBA plans at issue after notice 95-34 and the IRS audits was patently unreasonable. The Court finds that a reasonable person would not continue to participate in a tax avoidance scheme after the IRS issues a notice condemning such plans, and that person was the subject of an IRS audit of his participation in that plan.

In the *Neonatology* litigation, the Third Circuit commented on the conduct of the physician-petitioners, when discussing whether it was appropriate for the Tax Court to impose "negligence-related" penalties on the them:

> [w]hen, as here, a taxpayer is presented with what would appear to be a fabulous opportunity to avoid tax obligations, he should recognize that he proceeds at his own peril. In this case, [Murphy Defendants] devised a program which it marketed as "creat[ing] a tax deduction for the contributions to the employee welfare benefit plan going in and a permanent tax deferral coming out." As highly educated professionals, the individual taxpayers should have recognized that it was not likely that by complex manipulation they could obtain large deductions for their corporations and tax free income for themselves.

Neonatology Associates, P.A. v. Comm'r Internal Revenue, 299 F.3d 221, 234 (3d Cir. 2002). According to this analysis, Plaintiffs should have been on notice of potential problems from the first time they were introduced to the VEBA plans.

Moreover, under the theory propounded by Plaintiffs' complaint, any damages Plaintiffs might have had in 1995 would have been "concrete." By that point they had been contributing to the VEBA plans since 1990. Certainly, it would be possible for an accountant to determine any deficiency Plaintiffs would have had to remit to the IRS, along with any penalties. Such damages may have then been available in the RICO context.

B. *Equitable Tolling*

Plaintiffs contend that regardless of Notice 95-34 or the IRS audits, the statute of limitations for their RICO claims was tolled because of Defendants' fraudulent concealment of their racketeering activity. "Fraudulent concealment is an 'equitable doctrine [that] is read into every federal statute of limitations.' " *Davis v. Grusemeyer*, 996 F.2d 617, 624 (3d Cir. 1993). The Supreme Court has indicated that RICO's four-year limitation period can be tolled "where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it." *Rotella*, 528 U.S. at 561.

In order to establish fraudulent concealment, a plaintiff has the burden to show three necessary elements: (1) "active misleading" by the defendant, (2) which prevents the plaintiff from recognizing the validity of her claim within the limitations period, (3) where the plaintiff's ignorance is not attributable to her lack of "reasonable due diligence in attempting to uncover the relevant facts." *Mathews*, 260 F.3d at 256. However, when a plaintiff merely seeks to survive summary judgment, there need only be a genuine issue of material fact that the doctrine applies. *Id.* Thus, a court must determine:

> (1) whether there is sufficient evidence to support a finding that defendants engaged in affirmative acts of concealment designed to mislead the plaintiffs regarding facts supporting their RICO claims,
>
> (2) whether there is sufficient evidence to support a finding that plaintiffs exercised reasonable diligence, and

> (3) whether there is sufficient evidence to support a finding that plaintiffs were not aware, nor should they have been aware, of the facts supporting their claim until a time within the limitations period measured backwards from when the plaintiffs filed their complaint.

Id. Absent evidence to support these findings there is no genuine dispute of material fact on the issue and the Defendants are entitled to summary judgment. *Id.*

Even assuming that the first prong of the analysis is present, that Defendants engaged in affirmative acts of concealment, Plaintiffs cannot overcome the second and third prongs, namely that they engaged in reasonable diligence and could not have been aware in 1995 of the facts supporting their RICO claims. In order to avoid summary judgment, there must be a genuine issue of material fact as to whether the Appellants exercised reasonable due diligence in investigating their claim. *Id.* at 257. As discussed above, Plaintiffs did not exercise reasonable diligence in investigating the tax issues surrounding the VEBAs. As to the third prong, it would be hard for Plaintiffs to argue that they could not have been aware of facts supporting their RICO claims because they did not do any investigating to find out.

II. *Collateral Estoppel*

In this case parties from both sides have moved to bind their opponents via the doctrine of collateral estoppel by the findings of the Tax Court in *Neonatology Associates, P.A. v. Commissioner*, 115 T.C. 43 (2000). The doctrine of collateral estoppel prevents the relitigation of issues that have been decided in a previous action. *Montana v. United States*, 440 U.S. 147 (1979). Also referred to as issue preclusion, the doctrine "protect[s] litigants from the burden of relitigating an identical issue with the same party or his privy and . . . promot[es] judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

Specifically, Plaintiffs seek to bind Defendants by the Tax Court's findings as to the role each played in the VEBA scheme. Defendants seek to hold Plaintiffs to the Tax Court's findings that Plaintiffs were negligent in not conducting an independent investigation into the VEBA plans.

However, a trial court has broad discretion to determine whether collateral estoppel should be applied, *id.* at 331, and any doubts about application of collateral estoppel should usually be resolved against its use, *Witkowski v. Welch*, 173 F.3d 192, 206 (3d Cir. 1999) (citing *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3d Cir.1970)). In this instance, none of the Defendants or Plaintiffs were actual parties to the *Neonatology* litigation, and there is some doubt as to whether any of the parties in this case had sufficient privity with the parties in *Neonatology* to be bound by the factual findings of that decision. This Court finds that because of the extremely complex nature of this action and the desire to address all of the issues in one proceeding, that it will not bind either the Plaintiffs or the Defendants to the factual findings of the Tax Court via the doctrine of collateral estoppel.

III. *Benefit of the Bargain*

Defendants also contend that summary judgment should be granted on Plaintiffs' "benefit of the bargain" damages. Under this theory, Plaintiffs are seeking to recover damages for losses incurred as a result of Plaintiffs' inability to make future contributions to VEBA programs as a result of the adverse determination by the Tax Court. Not only does this Court find that such damages would be highly speculative, such damages would require the Court to enforce what turned out to be an illegal tax avoidance scheme. Because it is a "universal rule that it is unlawful to contract to do that which it is unlawful to do," *Bank of United States v. Owens*, 27 U.S. 527, 538 (1829), this Court will grant summary judgment in favor of Defendants on Plaintiffs' "benefit of the bargain" theory of recovery.

IV. *Plaintiffs' Claims Under ERISA §§ 409, 502(a) (Count I)*

Defendants Murphy and Monumental claim that summary judgment should be granted on Count I of Plaintiffs' complaint, as that count relates to § 409 and § 502(a)(2) of ERISA. The liability of fiduciaries is governed by § 409 of ERISA, which provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the . . . duties imposed upon fiduciaries by [ERISA] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). Section 502(a)(2) of ERISA entitles individual participants to sue "for appropriate relief" under § 409. 29 U.S.C. § 1132(a)(2).

In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985), the Supreme Court held that liability under § 409 accrues only to the plan itself, not to participants suing in their individual capacities. Thus, § 502(a)(2) in effect allows individual participants to sue "in a representative capacity on behalf of the plan as a whole." *Id.* at 142 n.9. Because Plaintiffs here seek to recover benefits allegedly owed to them in their individual capacities, and the employer plans are not named as plaintiffs in the complaint, summary judgment will be granted on Count I, as it relates to § 409 and § 502(a)(2) of ERISA.

V. *Plaintiffs' State Law Claims*

On July 8, 2002, this Court entered an order dismissing Plaintiffs' state law claims as being preempted by ERISA. In that Memorandum and Order, this Court specifically stated that "ERISA is the appropriate mechanism through which Plaintiffs can seek relief," and that their claims for fraud and fraud in the inducement were cognizable under § 502(a) of ERISA, 29 U.S.C. 1132(a). In addition, the Court found that because all of Plaintiffs' state law claims "related to" the ERISA plans in question, that they were preempted by § 514(a) of ERISA, 29 U.S.C. 1144(a).

The dismissed claims were: New Jersey's Racketeering Act (Count VIII); Conspiracy to Violate New Jersey Racketeering Act (Count IX); New Jersey Consumer Fraud Act (Count X); unjust enrichment (Count XI); common law fraud (Count XII); negligent misrepresentation (Count XIII); breach of fiduciary duty (Count XIV); breach of contract (Count XV); breach of duty (Count XVI); respondeat superior (Count XVII); and conspiracy and aiding and abetting (Count XVIII).

Upon further reflection after discovery in this matter has been completed, it seems that the dismissal of Plaintiffs state law claims was premature. Because "[d]etermining whether a claim could have been brought under ERISA has proven to be anything but an exact science," *Difelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 446 (3d Cir. 2003), this Court exercises its discretion under Fed. R. Civ. P. 54(b) and will reinstate Plaintiffs' state law claims.

As an initial matter, it is important to distinguish "complete preemption" under § 502(a) of ERISA, which is a jurisdictional concept, from "express preemption" under § 514(a) of ERISA, which is a substantive concept governing the applicable law. *In re U.S. Healthcare, Inc.*, 193 F.3d 151, 160 (3d Cir. 1999) (citing *Joyce v. RJR Nabisco Holdings Corp.*, 126 F.3d 166, 171-72 (3d Cir. 1997)). Claims that are completely preempted under § 502(a) are "necessarily federal in character," and thus are converted into federal claims. *Id.* (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)). Section 514(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). State law claims that are subject to express preemption are displaced and thus subject to dismissal. *Id.* (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)).

In order to determine whether Plaintiffs' state law claims are completely preempted, the Court must consider whether they "fall within the scope of" ERISA's civil-enforcement provisions." *Id.* at 161 (citing *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 355 (3d Cir. 1995)). Complete preemption occurs when federal law so completely preempts an entire area of law that the state cause of action is entirely displaced by federal law. *Joyce*, 126 F.3d at 171. The objective of this ERISA preemption clause was to remove the threat of conflicting and inconsistent state and local regulations; to "avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657 (1995). The Court finds that in enacting ERISA, the federal government did not intend to completely preempt the areas of state law comprising Plaintiffs' state law claims.

In its July 8, 2002 Memorandum, the Court also found that Plaintiffs' state law claims, Counts VIII though XVIII were expressly preempted under § 514, because they related to the ERISA plans. "A law 'relates to' an employee benefit plan [under § 514], in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)). However, "[p]re-emption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability." *Travelers*, 514 U.S. at 661. The Third Circuit has outlined a basic test to determine whether a state law relates to an ERISA plan:

> A rule of law relates to an ERISA plan if it is specifically designed to affect employee benefit plans, it if singles out such plans for special treatment, or if the rights and restrictions it creates are predicated on the existence of such a plan.
>
> * * * * * *
>
> This does not end our inquiry, however. A state rule of law may be preempted even though it has no such direct nexus with ERISA plans if its effect is to dictate or restrict the choices of ERISA plans with regard to their benefits, structure, reporting and administration, or if allowing states to have such rules would impair the ability of a plan to function simultaneously in a number of states.

Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc., 93 F.3d 1171, 1185 (3d Cir. 1996) (quoting *United Wire, Metal and Machine Health and Welfare Fund, et al. v. Morristown*

Memorial Hospital, 995 F.2d 1179, 1192-93 (3d Cir. 1993)).

Here, Plaintiffs' state law claims include alleged violations of the New Jersey Racketeering Act and the New Jersey Consumer Fraud Act, unjust enrichment, fraud, negligent misrepresentation, breach of fiduciary duty, breach of contract, breach of fiduciary duty, respondeat superior, conspiracy and aiding and abetting. The gravamen of each of these counts is dependent upon whether Defendants negligently or intentionally misrepresented to Plaintiffs that the VEBA plans were legitimate tax avoidance schemes when Defendants knew, or should have known, that the plans did not.

A determination as to these counts does not require an examination of the particulars of the VEBA plans. Rather, these claims turn on the Defendants' actions outside of the ERISA context; reference to the VEBA plans will only form a backdrop to this action. Thus, Plaintiffs' claims against Defendants for actions taken to market the VEBA plans or induce Plaintiffs to establish or continue to participate in the Plan are not preempted by ERISA, and will be reinstated.

The Court understands that Defendants may desire the opportunity to file motions for summary judgment with respect to Plaintiffs' revived state law claims. Such motions are to be filed not later than March 24, 2004, and will be returnable, April 19, 2004.

CONCLUSION

For the reasons discussed above, Defendants' motions for summary judgment will be granted, the motions for collateral estoppel will be denied, and Plaintiffs' state law claims will be reinstated. The accompanying order will be entered.

March 2, 2004	s/ Anne E. Thompson
DATE	ANNE E. THOMPSON, U.S.D.J.